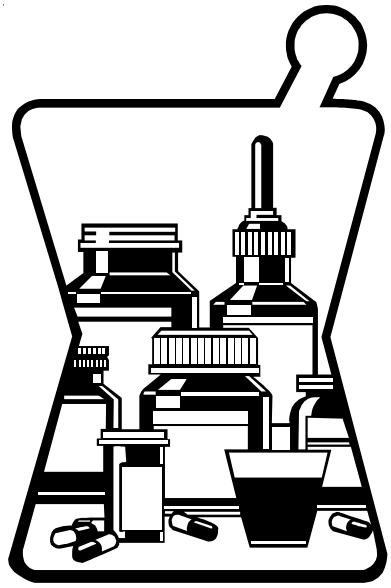
The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 24, Issue No. 7 November 2002

What is Rx for Kentucky's criminal cases involving alcohol and drugs?

A Special *Advocate* Issue on Alcohol and Drugs



- **ABA Releases Evaluation of Kentucky's Representation of Juveniles**
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Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Ed Monahan

Alcohol and Drugs
What is the recipe for Kentucky's criminal cases involving alcohol and drugs? What is the prescription for real solutions that honor constitutional values? Is the therapeutic and corrective direction we are headed in prudent? What more should we be doing?

Many of us would have a ready answer, if only…. The reality is more likely a complicated web of interrelated strategies.

Kentucky has responded directly and indirectly to the scourge of alcohol and drug problems in a variety of ways. Many need treatment. Drug cases present major challenges in nature and numbers.

There are drug courts with remarkable success. There is research with significant insights on cause, interventions, and strategies.

And imagine that some of those charged with drug offenses are innocent. Some while not innocent are overcharged. Some were charged or prosecuted illegally. And, the topic we hate to discuss, some citizens are racially profiled in drug cases. A strong statewide public defender system that provides professional, vigorous representation to the 14,000 clients charged with drug offenses it represents is an essential part of the recipe.

The Advocate previously published a special issue on drugs in July 1996 asking, are our hands tied behind our backs in drug cases? They weren't then and as this issue demonstrates they aren't now.

The Right to Counsel
During this 30th year of Kentucky's statewide public defender system, we are in sight of the 40th Anniversary of *Gideon*. Two right to counsel cases, *Fraser* and *Shelton*, shape anew the law and practice nationally and in Kentucky.

Juvenile Representation
In this issue, we also present a significant evaluation by the ABA of Kentucky's ever-important juvenile representation. We report the steep decline in juvenile violent crimes, and we explore the complexity of issues of juvenile sex offenders.

Tell Us
Amidst the complexity of criminal practice in these times, we are working to bring helpful information to our readers. Tell us how we can do a better job of this. Tell us what additional information you would find helpful in your dealing with cases involving drugs and alcohol. And for context, let us remember that Rudyard Kipling instructed us that, "Words are, of course, the most powerful drug used by mankind."

Ed Monahan
Deputy Public Defender

Defending Drug Cases

The intent of this article is twofold. First, it will remind trial attorneys that drug cases are triable and contain numerous legal issues. Consequently these cases must be aggressively prepared at the pretrial stage and then actually tried by jury. Second, the format is designed to take attorneys through, step-by-step, the defense of drug cases. However, the article should not be used as a substitute for the trial attorney taking the time to exhaustively research each legal issue in a given case.

Racial Profiling

In every drug case defense counsel must thoroughly investigate whether racial profiling played any part in the defendant's stop, search, and subsequent arrest. Racial profiling should be cited as an additional basis to suppress. Concerns over the possible use of racial profiling in Kentucky led to legislation in 2001 by the General Assembly. In 2000, the bill sponsored by Senator Gerald Neal that would have required the collection of data to look at the issue of racial profiling failed to get out of the State Judiciary Committee. As a result Governor Patton issued Executive Order 2000-475 on April 21, 2000, directing that no state law enforcement agency or official stop, detain or search any person solely because of "race, color or ethnicity." The order was reprinted in *The Advocate*, Volume 22, No. 3 (May 2000). Pursuant to that order, a Vehicle Stop Reporting Model Policy was developed by the Justice Cabinet.

KRS 15A.195(1) states that:

> "No State law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person."

Under Subsection (2) of that statute the Secretary of the Justice Cabinet was required to "design and implement a model policy to prohibit racial profiling by state law enforcement agencies and officials." Defense counsel must obtain a copy of the model policy from the Justice Cabinet or Kentucky Law Enforcement Council. The statute further "urges" all local law enforcement agencies and sheriffs' departments "to implement a written policy against racial profiling or adopt the model policy against racial profiling as established by the Secretary of the Justice Cabinet." See KRS 15A.195(3). Check with your local law enforcement agency and sheriff 's department to obtain a copy of any policies adopted. Any "local law enforcement agency that participates in the Kentucky Law Enforcement Foundation Program Fund under KRS 15.420 in the Commonwealth shall implement a policy, banning the practice of racial profiling, that meets or exceeds the requirements of the model policy disseminated under subsection (3) of this section." See KRS 15A.195 (4) (a). According to the Legislative

Research Commission's Local Mandate Fiscal Impact Estimate, as of March 5, 2001,there were 360 law enforcement agencies receiving supplemental funding through the KLEPF.

Any such policies are required to be submitted by the local law enforcement agencies to the Secretary of the Justice Cabinet and are available to defense counsel. Funding is withheld until the Secretary approves a policy submitted by any agency. Once approval is granted, the policy can not be changed without obtaining the Secretary's approval. See KRS 15A.195 (4)(b).

The procedures for reporting allegations of racial profiling are set forth under 40 KAR 7:010. Reports of violations of KRS 15A.195 can be filed by computer, telephone, facsimile or in writing with the Office of the Attorney General. The information includes the name, address, and telephone number of the person who filed the complaint; name, address, and telephone number of any witness; officer's name or badge number if known; and a description of the allegation. Defense counsel must obtain copies of any reports relating to the officer(s) on your case. Patterns may emerge with certain officers, or even particular law enforcement agencies, that are highly relevant for a court to consider in ruling on a suppression issue.

Defense counsel must also check with the local law enforcement agency for any complaints filed against the police officer(s). The Open Records law can be used to obtain the complaints and dispositions. See KRS 61.872.

Keep in mind that you may need to utilize Chapter 31 and approach the court for authorization to use expert witnesses. These expert witnesses can take any data that you collect and possibly render an opinion in court regarding the basis of the stop in your case. Governor Patton's executive order in 2000 also directed that data on the state police be gathered to determine the extent to which racial profiling occurs. *The Courier-Journal* reported in an article on March 2, 2001, that the "Louisville police have adopted a policy banning racial profiling, and the department began [that] year to collect data on the race of drivers stopped by police." Data from the state police and local law enforcement agencies should be available through the Open Records Law and/or by court order to defense counsel for evaluation. See KRS 61.872.

Researchers at the University of Louisville found after conducting a juvenile justice study for 10 months that minority youths in Kentucky are detained at a higher rate than whites. A sociology professor, Clarence R. Talley, who led the study, "relied on state data as well as interviews with police officers, judges, prosecutors, defense lawyers and others involved with the juvenile justice system....[In] [t]he interviews...[some] suggested racial bias or 'profiling'" as the cause for the different treatment of minority and white juveniles. *See* "Juvenile Justice Study Finds Racial Discrepancy," *The Courier-Journal*, May 15, 2002.

The University of Louisville's Justice Administration Department released a report on August 7, 2002, after analyzing 48,000, traffic stops from 2001. While failing to find that the Louisville Police Department as a whole systematically stop motorists because of race or ethnicity, the study did conclude that "nonwhites were more likely to be searched than whites." *See* "Louisville Police Don't Do Race Profiling," *The Lexington Herald-Leader*, August 8, 2002. "The U of L researchers stated in the report that 'our findings do not conclude that such profiling might not be occurring against individual citizens by one or more individual officers.'" *See* "Traffic Study Finds No Racial Profiling," *The Courier-Journal*, August 8, 2002. The current chief of the Louisville Police Department told the newspaper that, "I'm not saying that we don't have some biased officers because I'm sure we do...We still must be vigilant." *See* "Louisville Police Don't Do Race Profiling," *The Lexington Herald-Leader*, August 8, 2002.

The study by the University of Louisville has many critics primarily due to the researchers' methodology. "David Harris, a law professor at the University of Toledo who wrote the book *Profiles in Injustice: Why Racial Profiling Cannot Work*, stated, 'If they're not using a baseline, that means they cannot draw the conclusion that they have....In order to know whether race is a factor in who gets pulled over, you have to have something to compare it to.'" *See* "Traffic Study Finds No Racial Profiling," *The Courier-Journal*, August 8, 2002.

A previous study by the *Courier-Journal* used such a benchmark as the experts in racial profiling indicate is needed in order to draw valid conclusions. "In October 2000, the *Courier-Journal* published a review of city police traffic stops. The newspaper's study of more than 1,600 stops found that African-American drivers were pulled over and checked for arrest warrants at twice the rate of white drivers. The newspaper studied data from 30 randomly selected days from 1999-2000. The newspaper used as a benchmark the number of driving-age Louisvillians and stationed observers along Bardstown Road to observe motorists and record their race." *See* "Traffic Study Finds No Racial Profiling," *The Courier-Journal*, August 8, 2002. Defense attorneys need to obtain copies of the studies from the University of Louisville and the *Courier-Journal*. After analyzing the reports and data, serious consideration needs to be given to hiring an expert under KRS Chapter 31. As of August 2002 the city of Louisville was 6 months into collecting data for the 2nd year of the study.

Right to Test

Defense counsel should always consider having the alleged drug examined by someone other than the prosecution's expert. *James v. Commonwealth*, Ky., 482 S.W.2d 92 (1972), recognized a defendant's right to independently analyze the alleged drug. Subsequent cases have reiterated this right and stated "the right to testing is implicit under RCr 7.24." *Green v. Commonwealth*, Ky.App., 684 S.W.2d 13, 16 (1984). *See also Taylor v. Commonwealth*, Ky.App., 984 S.W.2d 482 (1998).

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Funding for defense testing would be covered under KRS 31.185 and 31.200.

If the drug sample was consumed in testing by the prosecution's expert then a motion to dismiss and/or a motion to suppress the results generated by the state's expert should be made. Rely in part on *Green v. Commonwealth*, Ky.App., 684 S.W.2d 13, 16 (1984), which states, "we hold the unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged, renders the test results inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation."

Failure to move for independent testing can hurt the defense in other ways. For example, in *Sargent v Commonwealth*, Ky., 813 S.W.2d 801, 802 (1991) the defense contended that the prosecutors had not given to them the laboratory reports of the marijuana. The defendant announced "ready" and "the trial judge ... [found] that the Commonwealth had substantially complied with the discovery order and that Donald Sargent had suffered no prejudice because he did not move for independent testing of the marijuana." However, three Justices in dissent stated, "[i]n announcing ready, the defense was perfectly justified in believing that the Commonwealth had complied with the express order of the court, that there was no undisclosed scientific evidence." *Id.* at 803.

In *Howard v. Commonwealth*, Ky.App., 787 S.W.2d 264 (1990), the Commonwealth failed to produce the marijuana which was allegedly possessed by the appellant for purposes of sale. "In this case no marijuana was seized by the Commonwealth. Appellant was observed entering Hilltopper Billiards carrying a paper bag of sufficient size to contain a pound of marijuana. He was taped offering to sell Drake Jenkins a pound of marijuana for $1,600. Jenkins declined to buy because of the price, asking the appellant if he had any cheaper. The appellant replied that he did, but that he would have to deliver it later that evening because he didn't have the cheaper grade with him. The police did not arrest appellant at this time because of the ongoing investigation which they did not wish to jeopardize by making an arrest. As a result thereof, no marijuana was seized.... We do not, therefore, read *Jacobs* to require the Commonwealth to produce an actual physical sample of the controlled substance as that was not the issue addressed to the Court." *Id.* at 265-266. Additionally, "it appears that in Kentucky, there is no requirement that any of the substance be scientifically tested to be marijuana." *Taylor v Commonwealth*, Ky.App., 984 S.W.2d 482 (1998). *See also Commonwealth v. Harrelson*, Ky., 14 S.W.3d 541, 545-546 (2000).

Pretrial Motions

Suppression. Most drug cases involve some suppression issue. Search and seizure motions should always be considered under the Fourteenth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. Additional authority can often be found under the Rules of Criminal Procedure (RCr) and the Kentucky Rules of Evidence (KRE) and should be included in any suppression motion. This article will not attempt to cover the wealth of law in this area but the trial attorney must always be alert to suppression issues. See the prior section on racial profiling.

Priors. Good aggressive defense practice requires that the defense attorney always review the validity of prior convictions. Drug cases may involve prior convictions in three different settings. They are as follows: persistent felony offender, subsequent offender, and truth-in-sentencing. *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995), has made it more difficult to challenge prior convictions, at least, in cases involving persistent felony offender charges. The court in *Webb*, however, never specifically overruled *Commonwealth v. Gadd*, Ky., 665 S.W.2d 915 (1984). *Gadd* recognized the right in Kentucky to question the validity of a prior conviction by pretrial motion.

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed 2d 274 (1969), held that there would be no presumption from a silent record of the waiver of three important federal constitutional rights, (1) the privilege against self incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. Quoting *McGuire v. Commonwealth*, Ky., 885 S.W.2d 931 (1994), the *Webb* court stated, "Kentucky trial courts are no longer required to conduct a preliminary hearing into the constitutional underpinnings of a judgement of conviction offered to prove PFO status unless the defendant claims 'a complete denial of counsel in the prior proceeding.' ...The appropriate remedy to challenge...[prior] guilty pleas is through a [RCr] 11.42 proceeding and then the respondent 'may ...apply for reopening of any...sentence [thus] enhanced.'" *Webb*, 904 S.W.2d at 229. However, in *Woods v. Commonwealth*, Ky., 793 S.W.2d 809 (1990), the court held a prior guilty plea constitutionally defective because the court did not canvass *Boykin* rights with the defendant at the time of the plea even though the state rule permitted a plea of guilty in absentia prosecution for a misdemeanor.

Defense counsel should keep in mind that *Webb* was only addressing the attack on a prior used in a persistent felony offender proceeding. Therefore the Court did not specifically ruled on the issue of whether such attacks of prior convictions would be appropriate as to subsequent offenders status or in a truth in sentencing proceeding. To the extent that *Webb* is controlling in this area then defense counsel still must investigate pretrial the validity of prior convictions which are to be used in persistent felony offender, subsequent offender, and truth in sentencing proceedings. Consideration must then be given to challenging these prior convictions by way of filing a motion pursuant to RCr 11.42. Unfortunately, effective October 1, 1994, such a motion must be filed "within three years after the judgment becomes final." If the judgment became final before the effective date of the rule then the time commenced upon the effective date of RCr 11.42.

Informant. Many drug cases involve the use of an informant. In the event that the informant is an eyewitness then defense counsel is entitled to the name and address of the informant under *Burks v. Commonwealth*, Ky., 471 S.W.2d 298 (1971). The court noted that, "the significant point is that when an informer participates in or places himself in the position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness." *Id.* at 300-301. The *Burks* court also noted that the "better practice [is] to raise the question by pretrial motion ...." *Id.* at 301.

Even if the informant is not an eyewitness the defense may be entitled to the identity of the informant. In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the court discussed whether a defendant charged under federal criminal laws was entitled to the name of an informant. The court was sympathetic to the defense position and noted, "His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." *Id.* at 629.

KRE 508 specifically deals with the identity of an informer. Under KRE 508 (c)(2), "[i]f the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following: (A) Requiring the prosecuting attorney to comply; (B) Granting the defendant additional time or continuance; (C) Relieving the defendant from making disclosures otherwise required of him; (D) Prohibiting the prosecuting attorney from introducing specified evidence; and (E) Dismissing charges." *See also Taylor v Commonwealth*, Ky., 984 S.W.2d 482 (1998).

One published decision regarding identity of informants, is *Commonwealth v. Balsley*, Ky.App., 743 S.W.2d 36 (1988) which was decided prior to KRE 508. The trial court ordered the identity of the informant to be disclosed for two separate reasons. The informant was a material witness. Also, the court ordered disclosure because, "this [J]udge is not satisfied that such information was received from a reliable informant, and in my judgment, the disclosure is required." *Id.* at 38. The detective's affidavit in support of the search warrant "was substantially similar or exactly the same as the 35 previous affidavits submitted by this officer in search warrant applications." *Id.* "[T]his and other disturbing elements of the investigation" supported the trial judge's ruling.

Surveillance Privilege. Kentucky has also addressed the so called "surveillance location privilege." In *Jett v Commonwealth*, Ky.App., 862 S.W.2d 908 (1993) a privilege was recognized. However, *Weaver v Commonwealth*, Ky., 955 S.W.2d 722, 727 (1997), overruled the *Jett* case. The court made clear that "if a police surveillance *privilege* is to be adopted in this Commonwealth, it must be adopted in accordance with the procedures established in KRE 1102 and 1103." 955 S.W.2d at 727.

Defense Strategies

Lack of knowledge is a viable defense when prosecutors and police officers seek to charge everyone in a dwelling while a search warrant is being executed, all occupants of an automobile which contained drugs, or persons who happened to be on a street corner where drugs are found nearby. In *Carr v. Commonwealth*, Ky., 481 S.W.2d 91 (1972), the evidence was insufficient to sustain the conviction of an automobile passenger. The defendant "was a passenger; he had driven the automobile on occasion; he was a friend of the [codefendant]." There is no direct evidence that he knew the drugs were in the automobile, that he used such drugs, that he pushed or sold such drugs on this occasion or at any other time, or that he knew that the [codefendant] did. [The defendant] is linked to the drugs by a Siamese integument leading to a two-headed body of suspicion and innocence, not a live, normal, squalling conviction. There is no direct evidence that he had possession or control of the drugs." *Id.* at 92. Additionally, "'one's mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission.'" *Houston v Commonwealth*, Ky., 975 S.W.2d 425, 929 (1998), (quoting *Rose v. Commonwealth*, Ky., 385 S.W.2d 202, 204 (1964))

Misidentification is a major defense in drug cases. Drug cases, in particular, are ripe for that defense because so many cases are a result of undercover operations and informants. Anytime there is a gap between the time of the alleged incident and the arrest then consideration must be given to the use of a misidentification defense. This defense succeeds more frequently when used in combination with an alibi. Keep in mind that Kentucky does not require the defense to give notice of an alibi defense. Under KRS 500.070(2), "No court can require notice of a defense prior to trial time."

Lack of possession is often used in drug cases. In *Paul v. Commonwealth*, Ky.App., 765 S.W.2d 24 (1988), four persons were in an automobile that was pulled over for speeding. The detective approached the vehicle and observed a small amount of marijuana at the driver's feet and two marijuana roaches in the dashboard ashtray. He also smelled marijuana inside the car. The defendant was sitting in the back seat on the right side and the owner of the vehicle was sitting in the front seat on the right side. "[P]erson who owns or exercises dominion or control over a motor vehicle is deemed to be the possessor of any contraband discovered inside it." *Id.* at 26. "[A] person's mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy.… The probable cause requirement is not satisfied by one's mere propinquity to others independently suspected of criminal activ-

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-ity." *Id.* The denial of the motion to suppress was reversed and the case remanded.

In *Leavell v. Commonwealth*, Ky., 737 S.W.2d 695 (1987), there was evidence that the defendant was in possession of the ignition key to an automobile which had 90 pounds of marijuana in the trunk. The evidence supported a finding that the defendant was in constructive possession of the marijuana, notwithstanding the fact that the key he had would not open the doors or trunk of the car. The owner of the car who had given the defendant the key testified that it was his intention to transfer possession of the marijuana over to the defendant and that they had used this method of transfer on previous occasion. "The person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband." *Id.* at 697. *See also Burnett v. Commonwealth*, Ky., 31 S.W.3d 878 (2000).

The court held in *Coker v. Commonwealth*, Ky.App., 811 S.W.2d 8 (1991), that the evidence was insufficient to sustain the co-defendant's conviction for trafficking in cocaine or possession of drug paraphernalia. She was not named in the search warrant or the affidavit supporting the search warrant. The "evidence fell well short of establishing that this appellant exercised dominion and control over the premises at the time they were searched and the evidence seized." *Id.* at 10.

In another case, *Clay v. Commonwealth*, Ky.App., 867 S.W.2d 200 (1993), the court found that it was not clearly unreasonable for a jury to believe that the defendant constructively possessed cocaine which was found in her house, although a codefendant claimed ownership of the cocaine and said it was for his personal use only. Three ounces of cocaine were found in the defendant's kitchen and bathroom, measuring scales and baggies were found in the kitchen, over $11,000 was found in the defendant's purse, police detectives testified that cocaine is generally sold on the street in quantities of one gram or less, handguns and ammunitions were found in the home, and the defendant possessed unexplained wealth. *Id.* at 202.

No one was on the premises when a search warrant was executed in *Hargrave v. Commonwealth*, Ky., 724 S.W.2d 202 (1986). It was the defendant's home and a week after the search the defendant turned himself in to the police. "'Possession' sufficient to convict under the law need not be actual; 'a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion or control.'" *Id.* at 203.

In *Rupard v. Commonwealth*, Ky., 475 S.W.2d 473 (1971), "[t]he circumstances presented in this case support a rational inference that these appellants had constructive possession and probably actual possession of the marijuana which was found in the abandoned farmhouse. The owner of the house testified that he had not authorized either of the appellants to use the house. One of the officers saw the appellants go upon the porch of the house as if to enter; both of the officers saw the appellants coming from the direction of the house to their car and noted that one of them appeared to be deeply affected as if under the influence of a narcotic. Marijuana was found in their automobile in plain view. When the officers returned to the house, they discovered that another batch of marijuana had been bagged and the scales had been moved from the position where the officers had seen them earlier. These circumstances suffice to support the rational inference that these appellants indeed had dominion and control of the marijuana in the abandoned house; hence, it was appropriate for the trial court to admit the contraband material into evidence." *Id.* at 475-476.

There was a two story building containing a club on the first floor and an apartment on the second floor in *Dawson v. Commonwealth*, Ky., 756 S.W.2d 935 (1988). A search revealed a number of pills in the apartment area. The defendant claimed to have moved several months earlier. The court held the defendant "exercised dominion and control over the premises sufficient to establish constructive possession." *Id.* at 936. The search revealed: 1) numerous letters addressed to the defendant, 2) identification card with his picture, 3) insurance papers in his name and bills belong to him, 4) male clothing and 5) water and electricity, telephone, cable TV and postal service registered in his name. The gas bill was transferred to the name of a co-defendant five months after the defendant claimed to have moved from the apartment. There was also testimony that the defendant regularly left the club between 4:30 and 4:45 a.m. even though the bar was closed and no one else was there at those times. *Id.*

In *Powell v. Commonwealth*, Ky.App., 843 S.W.2d 908 (1992) the court held "that the definition of possession set forth in KRS 500.080 (14) is the proper definition to be contained in the jury instructions for cases arising under KRS 218A." *Id.* at 910. The court recognized that the "instruction actually given by the trial Court appear[ed] to authorize conviction because the items in question were *possibly* within the Appellant's constructive possession, rather than *actually* being within his dominion and control. The definition of constructive possession given under KRS 500.080 (14) clearly sets forth the actual dominion and control requirement." *Id.* However, "[t]o the extent the Court of Appeals in *Powell . . .*, require[d] actual possession of contraband for the purposes of KRS Chapter 218A, it is overruled. *Houston v Commonwealth*, Ky., 975 S.W.2d 925, 928 (1998).

Possession v. Trafficking. In many drug cases the issue is possession versus trafficking. Under KRS 532.080(5) and (7), even if the possession conviction is a felony, PFO status does not preclude probation, shock probation, or conditional discharge on a Class D felony which does not involve a violent act against a person. Also the 10 years minimum requirement for PFO 1st does not apply to Class D felony possession convictions. KRS 532.080(7). Numerous possession charges, depending on the drug in question, are misdemeanors. Conviction on a misdemeanor avoids a felony record,

prison time, and a persistent felony offender charge. The search of an apartment in *Dawson v. Commonwealth*, Ky., 756 S.W.2d 935 (1988), yielded 19 Demorals, 12 Percodans, 18 Talwins and 4 Valiums. The Talwin tablets were in the ceiling. "The number of pills which constitute a quantity that is inconsistent with personal use has not been legally or medically defined." *Id.* at 936. "Here there was a large quantity of drugs not found in any labeled prescriptions container with the Talwin tablets concealed behind aluminum foil covering the ceiling. The mere possession of several controlled substances not in prescription containers is sufficient to sustain a charge of unlawful possession of a controlled substance. The fact that some of the controlled substances were in nightstands and other easily discernible places but one substance was secreted and hidden in a cache in the ceiling is so incongruous as to justify a jury to believe that the particular substance was possessed, not for personal use, but for the purpose of sale." *Id.* at 936.

The court found the evidence sufficient to support a conviction for cocaine trafficking in *Green v. Commonwealth*, Ky., 815 S.W.2d 398 (1991). "In the course of the arrest, the black pouch was discovered several feet from him. It contained $75 and 35 small bags of cocaine. Although only one of the arresting officers actually saw the pouch fall from appellant's hand, such evidence was sufficient to create an issue of fact for the jury." *Id.* at 399.

In *Faught v. Commonwealth*, Ky., 656 S.W.2d 740 (1993), "the seizure from appellant of 4.7 grams of cocaine, an apparatus used to sift cocaine, and a bag of manitol together with Detective Bledsoe's testimony that cocaine is normally sold by the gram sufficiently raises a jury question of whether appellant possessed the cocaine with intent to sell." *Id.* at 742.

The court affirmed a trafficking conviction in *Brown v. Commonwealth*, Ky.App., 914 S.W.2d 355 (1996). The defendants had large quantities of cash and pagers and one defendant had a gun, rolling papers, and false identification. The 20 rocks of cocaine was sufficient to get the case to the jury.

In marijuana cases a presumption can be found in KRS 218A.1421 (5). That statute states, "the unlawful possession by any person of eight (8) or more ounces of marijuana shall be prima facie evidence that the person possessed the marijuana with the intent to sell or transfer it." Notwithstanding this statute defense counsel must keep in mind that the jury is never informed of the presumption. The presumption merely allows the Commonwealth to meet its burden of overcoming a motion for a directed verdict of acquittal so that the case can be submitted to the jury.

Definitions for "sell," "traffic," and "transfer" can be found in KRS 218A.010 (22), (24), and (25).

As shown by the aforementioned cases, quantity is an important factor in the argument to a jury that the drugs in question were possessed for personal use and not for sale.

Quantity. Apart from being a major factor in determining possession versus trafficking, the quantity in question is not significant other than in marijuana cases. In *Commonwealth v. Shivley*, Ky., 815 S.W.2d 572 (1991), "A state forensic chemist testified at the hearing that the test tube and pipe contained cocaine. The residue could not be accurately weighed, but it was stipulated that a sufficient amount of the residue remained available for testing." *Id.* The trial court adopted the reasoning of the California Supreme Court and applied "usable quantity" approach. The Supreme Court held that "[n]either statute determines any amount of cocaine which may be possessed legally. Cocaine residue is, in fact, cocaine and we find no argument to the contrary." *Id.* at 573. "[P]ossession of cocaine residue (which is cocaine) is sufficient to entitle the Commonwealth's charge to go to a jury when there is other evidence or the inference that defendant knowingly possessed the controlled substance." *Id.* at 574. *See also Bolen v. Commonwealth*, Ky., 31 S.W.3d 907 (2000).

Penalties are different under KRS 218A.1421 for trafficking in marijuana depending upon whether the quantity is less than 8 ounces, 8 ounces or more but less than 5 pounds, or 5 pounds or more.

Entrapment/outrageous police conduct is often times a viable defense in drug cases. As to state law on entrapment, one needs to consult KRS 505.010 for the specific elements. The entrapment defense was addressed in *Commonwealth v. Day*, Ky., 983 S.W.2d 505 (1999). "The defense of entrapment is available when there is evidence that the defendant was induced by police authorities, or someone acting in cooperation with them, to commit a criminal act which he was not otherwise disposed to commit." *Id* at 508.. Other cases on the entrapment defense in state court are as follows:

1) *Armstrong v. Commonwealth*, Ky., 517 S.W.2d 233 (1974),
2) *Schmidt v. Commonwealth*, Ky., 508 S.W.2d 716 (1974),
3) *Dumond v. Commonwealth*, Ky., 488 S.W.2d 353 (1972), and
4) *Shanks v. Commonwealth*, Ky., 463 S.W.2d 312 (1971).

The entrapment defense may also be supported by federal constitutional law. *See Jacobson v U.S.*., 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed. 2d 174 (1992). In *U.S. v. Russell*, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), the court addressed the entrapment defense. "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous the due process principles would absolutely bar the government from invoking judicial processes to obtain the conviction, *c.f. Rochain v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the instant case is distinctly not of that breed." 411 U.S. at 431-432, 93 S.Ct. at 1643.

Insanity. Another possible defense in a drug case is an insanity defense. A leading case in this area is *Tate v. Commonwealth*, Ky., 893 S.W.2d 368 (1995). In that case the defendant

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was convicted of possession of a controlled substance, robbery and of being a persistent felony offender. The issue addressed by the court was "whether drug addiction is a mental disease, defect or illness for purposes of KRS 504.020." *Id.* at 369. "We hold that a mere showing of narcotics addiction, without more, does not constitute 'some evidence' of mental illness or retardation so as to raise the issue of criminal responsibility, requiring introduction of the experts controversial testimony or an instruction to the jury on that issue. Due to the fact that *no evidence was presented that Tate was in need of a fix at that time*, there was an absence of the requisite evidence that at the time of the act charged, Tate had an abnormal condition of the mind which substantially impaired his behavior. In this case, the weight of the evidence was to the contrary as appellee's attempts to obtain money legally and the arresting officers' testimony showed appellee's lucidity at time of arrest." *Id.* at 372 (emphasis added). "Therefore, the trial court did not err in excluding Dr. Pelligrini's testimony on the grounds of lack of relevancy as no *probative* evidence was offered which a jury could reasonably infer that at the time of the criminal act, *as a result of mental illness or retardation*, appellee lacked substantial capacity to either appreciate the criminality of his acts or to conform his conduct to the requirements of law." *Id.* at 373.

Trifurcated Procedure

In *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1996) (overruled on other grounds), the Supreme Court approved of trifurcated procedure in which defendant in drug case was first convicted of drug offenses under instruction which made no reference to penalty. Defendant was then determined to be PFO and only after defendant was found guilty of drug charges and PFO status, jury was informed of range of penalties. Parties stipulated that trafficking charges were subsequent offenses. Such procedure reduced risk of undue prejudice during guilt phase of drug trial.

Double Jeopardy

The Kentucky constitution's double jeopardy prohibition no longer precludes the conviction of a defendant both for selling marijuana to a minor and for trafficking within 1000 yards of a school. *See Commonwealth v Burge*, Ky., 947 S.W.2d 805, 811 (1997) which overruled *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990).

In *Commonwealth v. Grubb*, Ky., 862 S.W.2d 883 (1993), the court held that "[a] single sales transaction between the same [people] at the same time and place which violates a single statutory provision does not justify conviction or a sentence for separate crimes, even though more than one item of a controlled substance (of the same schedule) is involved." *Id.* at 884. Otherwise, a single criminal transaction could be divided into multiple offenses based only on the total number of pills which were involved. Here, the defendant sold Percodan and Dilaudid (schedule 2 narcotics) in one transaction on January 9, 1990 to undercover police officers. Simultaneous possession or sale of more than one of the controlled substances enumerated *in the same schedule* constitutes only one offense. At a minimum a portion of the *Grubb*'s analysis was undercut by *Commonwealth v. Burge*, Ky., 947 S.W.2d 805,810 (1997). However, *Burge* did not specifically overrule *Grubb*, 947 S.W.2d at 810-811.

In *Dishman v. Commonwealth*, Ky., 906 S.W.2d 335 (1995), Supreme Court held there was no double jeopardy bar to convicting defendant for trafficking in cocaine and criminal syndicate.

In *Commonwealth v. Bird*, Ky., 979 S.W.2d 915 (1998), the Court held the payment of a controlled substances excise tax for powder cocaine did not trigger the double jeopardy bar to subsequent criminal prosecution for drug trafficking.

In *Shelton v. Commonwealth*, Ky.App., 928 S.W.2d 817 (1996), the Court held that defendant received ineffective assistance of counsel. Attorney advised defendant to plead guilty to two separately punished drug offenses which, under double jeopardy standards, would only be subjected to one punishment because they involved a single act or transaction. The charges involved cocaine and methamphetamines but arose out of simultaneous possession of these drugs. In *Gray v. Commonwealth*, Ky., 979 S.W.2d 454, 455 (1998), the Court stressed that "the second transaction occurred at a different time and resulted in the transfer of a separate quantity of cocaine. As such, the second transaction was separate and distinct and did not result in an unconstitutional prosecution."

Police Officer Testimony

Several cases hold that a police officer can be an "expert." These cases, of course, open up the door to the defense obtaining an expert under Chapter 31 as well. Additionally the Commonwealth must lay a proper foundation in each case to qualify the police officer as an expert.

The defense can argue under RCr 7.24 that the defense is entitled to the expert's opinion before trial.

Kroth v. Commonwealth, Ky., 737 S.W.2d 680 (1987), allowed a police officer to testify that "a large quantity indicated that they were for sale, not personal use, based on his ten years of experience as a narcotics officer." *Id.* at 681.

In *Howard v. Commonwealth*, Ky.App., 787 S.W.2d 264 (1990) the trial court allowed a detective to "testify concerning the meaning of certain words used in the conversation between appellant and Jenkins on the theory that they were using 'drug language' not readily understood by the average juror.... We find nothing wrong with the Commonwealth presenting evidence interpreting drug language as it assisted the jury in understanding the taped conversations." *Id.* at 265.

Two police officers were allowed to testify as experts that it was their opinion that the nearly 15 pounds of marijuana seized

were for sale not for personal use in *Sargent v. Commonwealth*, Ky., 813 S.W.2d 801 (1991). Three justices in dissent stated, "such testimony constitutes an egregious usurpation of the function of the jury. Rather than perpetuating the flawed holding in *Kroth v. Commonwealth*, Ky., 737 S.W.2d 680 (1987), we ought today to seize the opportunity to overrule it." *Id.* at 803. In *Cooper v. Commonwealth*, Ky., 786 S.W.2d 875 (1990), the court allowed a police officer to testify that the location of a drug transaction was within 1000 yards of a school. The court noted that the officer's testimony was not challenged.

Instructions

Instructions in the case of *Morrison v. Commonwealth*, Ky., 607 S.W.2d 114 (1980) allowed the jury to convict the defendant if she "knew or could have known" that the prescription was forged. *Id.* at 115. "The phrase 'could have known' is too nebulous and all-inclusive and there is no conceivable way that its inclusion could be justified under the statute." *Id.* The judgment was reversed. As previously discussed, the case of *Powell v. Commonwealth*, Ky.App., 843 S.W.2d 908 (1992), adopts the definition of possession as set forth under KRS 500.080 (14) for cases arising under KRS Chapter 218A.

Severance

In *Harris v. Commonwealth*, Ky., 869 S.W.2d 32 (1994), a defendant was charged jointly in one count with a codefendant for trafficking in cocaine. The codefendant was also charged with a second separate trafficking offense. The trial judge denied the motion for severance. In reversing the conviction, the appellate court stated, "knowing that there was evidence that Harris had trafficked in narcotics on a different occasion made it more likely for the jury to infer that the allegation against Walker were true. We believe that this association demonstrates prejudice against Walker, and therefore reverse." *Id.* at 34.

In *Brown v. Commonwealth*, Ky.App., 914 S.W.2d 355 (1996), codefendant's motion for separate trial in drug trial was denied. Affirming the conviction the Court held that the codefendant had to demonstrate likelihood of prejudice to trial court which then resulted in abuse of discretion by that Court.

Chain of Custody

In *Commonwealth v. Hubble*, Ky.App., 730 S.W.2d 532 (1997), the court made clear that "the Commonwealth has the burden of identifying and tracing the chain of custody from the defendant to its final custodian." *Id.* at 534. In *Faught v. Commonwealth*, 656 S.W.2d 740 (1983), the court was "satisfied that the substances introduced at trial were taken from appellant's possession and that the Commonwealth satisfied its burden of proving the evidence was securely stored under reliable procedures in storage facilities provided for that purpose." *Id.* at 741.

Closing Argument by Prosecutor

The prosecutor in *Whisman v. Commonwealth*, Ky.App., 667 S.W.2d 394 (1994), made remarks about drug dealers in the community and the abuse of drugs by children. "While these remarks give a first-blush impression of being improper because there is no factual basis for them in the record, we cannot give any in depth consideration because they were not objected to, so they were *not preserved for appellate review*." *Id.* at 398 (emphasis added).

Court's Discretion to Void Conviction

Under KRS 218A.275(9) an individual "convicted for the first time of possession of controlled substances" can ask the court to later set aside and void the conviction. A similar statute for possession of marijuana is KRS 218A.276 (8). Furthermore, KRS 218A.010 (25), states that "[f]or the purposes of [second or subsequent offense] a conviction voided under KRS 218A.275 or 218A.276 shall not constitute a conviction under this chapter."

Drug Court

"Drug Court" is a drug treatment program administered by the state. *See Dunson v. Commonwealth*, Ky.App., 57 S.W.3d 847 (2001).

Other Considerations

Methamphetamine. Manufacturing in methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense. KRS 218A.1432. *See also Commonwealth v. Hayward*, Ky., 49 S.W.3d 674 (2001). Possession of a methamphetamine precursor and distribution of a methamphetamine precursor are two new crimes created by House Bill 644 of the 2002 General Assembly. It is "prima facie evidence" of the intent to use certain drugs as a precursor if one possesses "more than 24 grams." It is a Class D felony for the first offense and Class C felony for each subsequent offense for possession of a methamphetamine. Unlawful distribution of a methamphetamine precursor is a Class D felony for the first offense, and Class C felony for the 2nd offense.

Facilitation. In *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995), the Court held that it was reversible error not to instruct jury on facilitation to trafficking in controlled substance. In *Houston v. Commonwealth*, Ky., 975 S.W.2d 925, 929 (1998), the Court noted that "[I]n the absence of any evidence that appellant was guarding the contraband for others, his mere presence at the scene would not have supported a conviction of criminal facilitation on that theory."

Collateral Criminal Activity. Kentucky law continues to firmly discourage the use of collateral criminal activity at trial in any case, including drug cases. In *Powell v. Commonwealth*, Ky.App., 843 S.W.2d 908 (1992) (overruled on other grounds), "[i]f appellant had been charged with trafficking in cocaine, the evidence concerning the alleged drug transactions in Tennessee would obviously be relevant. However, since the appellant was charged with mere possession of cocaine, the only transaction with any possible relevance to that charge was the last one, which occurred within a week of the date of the sei-

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-zure, if the evidence shows that it was cocaine that was seized. ...We find that the appellant's motion in limine should have been sustained, with the possible exception of the last transaction." *Id.* at 911.

The court in *Jett v. Commonwealth*, Ky.App., 862 S.W.2d 908 (1993) (overruled on other grounds) held that "[i]t is within the sound discretion of the trial judge to determine whether the probative value of evidence is outweighed by its possible prejudicial effect and to admit it or exclude it accordingly" in reference to cash and a beeper that the defendant was carrying when he was arrested. *Id.* at 911. The court further found that it was appropriate for the trial court to admonish the jury when a police officer referred to the defendant in testimony as a drug dealer.

In *Clay v. Commonwealth*, Ky.App., 867 S.W.2d 200 (1993), the court noted that the possession of a large amount of money by itself is not an indicia of criminality, but under the circumstances of the case, its introduction into evidence was proper. Furthermore, police officers executed a search warrant for drugs, and videotaped the scene and seizure of cash, guns and drugs. While upholding the admissibility of the videotape the court pointed out that the same standard applies which governs the admissibility of photographs. The introduction of such evidence requires the trial court to consider whether the probative value of the evidence outweighs its prejudicial effect.

Conditional Plea. A conditional plea may be used to test the validity of a trial court's ruling regarding a search. *Richardson v. Commonwealth*, Ky.App., 975 S.W.2d 932 (1998). Keep in mind that only the "approval of the court," not the prosecutor, is needed to enter a conditional plea under RCr 8.09.

Enhancement. A prior conviction for possession of marijuana cannot be used to enhance subsequent offenses of trafficking in cocaine and marijuana. *See Woods v. Commonwealth*, Ky., 793 S.W.2d 809 (1990). "Second or subsequent offense" is defined by KRS 218A.010(25).

In *Peyton v. Commonwealth*, Ky., 931 S.W.2d 451 (1996) the defendant was sentenced to 10 years on trafficking in Schedule II controlled substance cocaine. The sentence was enhanced to 30 years under PFO statute and sentence as subsequent drug offender was run concurrently. Court held that defendant *cannot* be sentenced under both PFO and subsequent drug offender provisions. She could only be sentenced under one or the other statute.

In *Gray v. Commonwealth*, Ky., 979 S.W.2d 454, 456 (1998), the Court held that prior felony convictions merged for purposes of PFO statute and, therefore, could not be divided for a subsequent drug offender enhancement. However, *Morrow v. Commonwealth*, Ky., 77 S.W.3d 558 (2002),overruled the Gray decision.

Marijuana. Defendant failed to overcome presumption of constitutionality as to marijuana statute. *Commonwealth v. Harrelson*, Ky., 14 S.W.3d 541 (2000).

Child Abuse. In *Commonwealth v. Welch*, Ky., 864 S.W.2d 280 (1993), the defendant was convicted of possession of a controlled substance, possession of drug paraphernalia and criminal child abuse. "The General Assembly intends no additional criminal punishment for the pregnant woman's abuse of alcohol and drugs apart from the punishment imposed upon anyone caught committing a crime involving those substances." *Id.* at 284. The criminal abuse conviction was vacated.

School. In *Sanders v. Commonwealth*, Ky. App., 901 S.W.2d 51 (1995), it was held that a junior college is a "school" within the meaning of KRS 218A.1411.

Tapes. The court in *Norton v. Commonwealth*, Ky.App., 890 S.W.2d 632 (1994) reiterated that it is within the discretion of the trial court to determine whether tape recordings should be excluded due to the quality of the sound.

Separation of Witnesses. In *Humble v. Commonwealth*, Ky.App., 887 S.W.2d 567 (1994), the trial court allowed a narcotics detective to sit at counsel table with prosecutor during drug trial. The court found no violation of RCr 9.48 or KRE 615.

Sexual Abuse. The definition of "physically helpless" now includes "a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influences of a controlled substance or legend drug."

Paraphernalia. Many times defendants are charged with possession of drug paraphernalia along with other charges. A first offense is a class A misdemeanor. Any plea bargain should be structured to avoid a guilty plea to the charge of possession of drug paraphernalia since a subsequent offense of possession of drug paraphernalia will be a class D felony. See KRS 218A.500(5). Any paraphernalia felony is precluded from being used as a prior for PFO. KRS 532.080 (8).

Firearm. Being "in possession of a firearm" while violating KRS Chapter 218A results in penalty enhancement. See KRS 218A.992. The penalty may be enhanced "if the violator has constructive possession of a firearm". *Houston v. Commonwealth*. Ky., 975 S.W. 2d 925, 927 (1998) (emphasis added). *See also Commonwealth v. Montague*, Ky., 23 S.W.3d 629 (2000). Sentence enhancement does not occur for violation of KRS 218A.210, possession of controlled substances while not in the original container.

Trafficking. An additional penalty for trafficking in a controlled substance or marijuana includes, for example, the costs of disposal of the controlled substances, KRS 218A.141.

Forfeiture. Real property may not, consistent with the fifth amendment's due process clause, be seized pursuant to a civil drug forfeiture statute [21 U.S.C. 881 (a)(7)] until the property owner has been given notice and an opportunity to be heard, unless the government is able to demonstrate exigent circumstances establishing the need for an immediate seizure of the property. *United States v. James Daniel Good Real Property*, 510 U.S. ___, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Gamma Hydroxybutyric Acid and Flunitrazepam. Both the possession of a controlled substance in the first degree and trafficking in a controlled substance statutes were expanded by the 2002 General Assembly to include gamma hydroxbutyric acid (GHB) and flunitrazepam.

Conclusion: Preparation

Nothing can substitute for preparation in trial work. In particular, drug cases have numerous factual and legal issues that require research and aggressive pretrial motion practice. This pretrial work coupled with the fact that drug cases are triable cases by their very nature leads one to the inescapable conclusion that favorable results at trial can be obtained in drug cases for our clients.

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Drug Abuse Interventions and Kentucky Research to Anchor Interventions

The U.S. justice system is awash with drug abusers with almost 70% of probationers reporting drug or alcohol use (Mumola, 1998), 83% of state prisoners reporting drug or alcohol use, and 52% of state prisoners reporting drug or alcohol use at the time of their offense (Mumola, 1999). In addition, almost one-third of U.S. state prison inmates report having ever been in drug abuse treatment (Mumola, 1999). Generally, drug abuse clients referred from the criminal justice system have positive treatment outcomes (Polcin, 2001; Farabee, et al., 1998; Anglin & Hser, 1991; Leukefeld, Tims & Farabee, 2002) which can incorporate clinical approaches that target criminal thinking (Wanberg & Milkman, 1999; Samenow, 1998; Yochelson & Samenow, 1977). The purpose of this article is to present findings from selected criminal justice related studies in Kentucky after overviewing national studies on drug abuse interventions.

Drug Abuse and Crime

The relationship between chronic drug abuse and crime has been documented in the research literature (*see* Loeber, Farrington, Stouthamer-Loeber, & van Kammen, 1998; Leukefeld, 1985; McBride & McCoy, 1993; Nurco et al., 1985; van den Bree, Svikis, & Pickens, 2000). Since the mid-1970's, federally supported studies have developed data on the drug-crime connection. The varied findings of these studies suggest that drug use intensifies, and perpetuates criminal careers. Federal efforts in the early 1980's targeted controlling the supply of drugs, determinate sentencing for drug offenders, and long prison terms. These efforts were followed by rapid increases in incarcerated chronic drug abusers. For example, Innes reported that 50% of federal inmates and 80% of state inmates had been drug-involved before incarceration (Innes, 1988). The Drug Use Forecasting (DUF) system renamed ADAM (Arrestee Drug Abuse Monitoring) indicates that 51 to 83 percent of male arrestees in major U.S. urban cities test positive for drugs (National Institute of Justice, 1999) which has been remarkably consistent over the years. Likewise, a number of drug abusers receiving community treatment are involved in the criminal justice system—largely on probation and parole.

Drug Abuse Interventions for Criminal Justice Involved Drug Abusers

Drug abusers involved in the criminal justice system have traditionally been referred to community drug abuse treatment by probation and parole agencies (Leukefeld, 1976; Leukefeld, Tims & Farabee , 2002), and from one point-of-view drug abuse treatment has its roots in the criminal justice system (Leukefeld, 1985). It has been suggested that the goals of community treatment and the criminal justice sanctions are compatible (Leukefeld, Matthews & Clayton 1992; Farabeee & Leukefeld, 2001). However, this is not universally accepted (Peale, 1995), although the goals of community treatment have been to reduce both drug use and crime (Anglin & Hser, 1991; Leukefeld & Tims, 1988). The interest in community drug abuse treatment and criminal justice sanctions has recently intensified with a proliferation of Drug Courts, which has increased the number of criminal justice referrals receiving community treatment (*see* Belenko, 2000; Logan et al. 2001). In addition, among substance abuse treatment facilities in the U.S. with special services, almost half (47%) provide services to criminal justice clients and 38% offer services to Driving Under the Influence (DUI) clients (SAMHSA, 2001). U.S. drug abuse treatment admission data indicate that over one-third (36.9%) of client admissions are directly referred from the criminal justice system (SAMHSA, 2001). Kentucky data indicate that almost three-fourths (64%) of clients receiving community treatment in 2000 were involved in the criminal justice system when DUI clients were included (Walker & Leukefeld, 2001).

Drug treatment interventions for criminal justice involved drug abusers has had success. For example, drug treatment interventions for drug offenders can be separated into categories including Civil Commitment (supervision of parolees with urine testing), Criminal Justice Authority (community corrections), Offender Community Treatment Services (community drug abuse treatment) and Treatment Services in Drug Courts, Prisons and Jails (Anglin, 1988; Gerstein & Harwood, 1990; Leukefeld & Tims, 1988b; Simpson & Sells, 1990; Belenko, 2000; Leukefeld, Tims and Farabee, 2002). The interest in examining interventions in criminal justice settings arises from (1) A decrease in the anti-rehabilitation atmosphere of the criminal justice system (Martinson, 1974); (2) Data collected on programs that have shown promise including the Stay'n Out Program in New York (Wexler et al., 1995), the Cornerstone program in Oregon (Field, 1985), the Amity program in California (Wexler & Graham, 1994), Drug Courts (Belenko, 1998), and aftercare Inciardi et al., 2002); (3) A large number of chronic drug abusers who are in the courts and incarcerated in overcrowded facilities; and (4) The need to develop interventions that can be used to examine retention and treatment responses of criminal justice involved drug abusers in community treatment.

There is research comparing criminal justice involved clients with those not involved in community treatment interventions (Leukefeld, Tims, & Farabee, 2002). Coerced treatment of criminal justice referred clients has been shown to produce favorable treatment outcomes (Anglin, 1988; Anglin & Hser, 1991; Anglin, Longshore, Turner, McBride, Inciardi, & Prendergast, 1996; Polcin, 2001). For example, Farabee, Prendergast and Anglin (1998) reviewed eleven coercion-based treatment outcome studies, some of which dated from

the 1970s. Of the eleven, 5 reported a positive relationship between the criminal justice referral and treatment intervention outcomes, four showed no difference, and two reported negative outcomes. Although these studies did not examine a specific intervention, the context of referral to treatment was examined. In the two studies that reported negative outcomes for criminal justice referred clients, the authors concluded that for some clients, coercion inhibits rather than facilitates treatment. Farabee, et al, (1998) described several problems with the research on coercion-based treatment including lack of consistent terminology, neglect of internal motivation assessment, and lack of program consistency, and fidelity to protocols. The clinical literature includes criminal thinking interventions for substance abusers (Wanberg & Milkman, 1999) and among criminals in institutional settings (Samenow, 1984; Yochelson & Samenow, 1976; 1977) which are promising.

Criminal Thinking Errors

Cleckley (1988) identified manipulative characteristics used by criminals in 1941 which were later described with greater precision as thinking errors by Yochelson and Samenow (1976) who published their research findings about criminals admitted to a forensic mental hospital. They described patterns and qualities of criminal thinking as well as thinking errors that emerged during clinical experiences with individuals being evaluated for competency to stand trial or being treated in lieu of incarceration (Yochelson and Samenow, 1976). The authors established a continuum of criminal thinking and a range of criminality patterns from responsible, normal ethical conduct to irresponsible, criminal conduct. Yochelson and Samenow (1976) also defined a range of criminality that included nonarrestable, arrestable, and extreme criminality. Yochelson and Samenow stressed the importance of remaining mindful of this continuum of criminality. Yochelson and Samenow (1976) identified 16 criminal thinking errors, many of which have been modified and incorporated into the clinical literature (Wanberg & Milkman, 1997; Leukefeld, Tims & Farabee, 2002). The following thinking errors, identified by Yochelson & Samenow (1976), were called "automatic perceptions of self and the world" or distortions that support criminal thinking errors: (1) Keeping a closed channel of communication; (2) Using "I can't" as an excuse for not taking responsibility; (3) Taking the victim role to avoid responsibility; (4) A lack of a time perspective; (5) Failure to empathize; (6) Failure to consider injury and harm to others; (7) Failure to assume obligations; (8) Failure to take responsible initiative; (9) Entitled ownership of property; (10) A fear of fear; (11) A lack of trust; (12) Refusal to be dependent on others; (13) Lack of interest in responsible performance; (14) Pretentiousness; (15) Failure to make effort or endure adversity; and (16) Poor decision-making.

Specialized Treatment Interventions

In addition to criminal thinking error interventions, therapies have been developed for targeted populations of drug abusers. Drug abuse treatment now includes interventions developed for client problems that can contribute to continued drug use such as the dually diagnosed (Laudet, et al., 2000; Rachbeisel, Scott, & Dixon, 1999) and victimization among drug abusing women (Logan, Walker, Cole & Leukefeld, 2002). Targeted treatment approaches also have been developed for antisocial behavior in children and adolescents with drug problems (Henggeler, Schoenwald, Bordun, Rowland & Cunningham, 1998) and social skills training has been developed for adult alcohol dependent individuals (Monti, Abrams, Kadden & Cooney, 1989). Motivational interviewing has been developed as a clinical intervention for engaging substance abusers in treatment (Miller & Rollnick, 1991) and cognitive therapy has been described for treating substance abuse in adults (Beck, Wright, Newman & Liese, 1993; Liese & Najavits, 1997), although cognitive therapy has received limited empirical testing. However, cognitive behavioral relapse prevention approaches for drug abusers have been shown to be effective in improving recovery (Annis, 1991). Brief interventions for alcohol and drug problems have received some empirical support. In addition, research has examined interventions for drug abusers with co-occurring disorders and there is limited support for using an integrated set of interventions for treating drug abusers with co-occurring mental health problems (McLellan & McKay, 1998). A criminal justice therapy should accommodate a specialized range of criminal behaviors from aggressive clients to clients arrested for drug possession. Criminality can include impulsive, emotionally reactive individuals as well as under-reactive psychopaths (Barrat et. al., 2000, Gottman, et.al., 1995; Loeber, et.al., 1998; Loeber & Stouthamer-Loeber, 1998; Moffitt, 1993). While temperament and personal characteristics may vary, a criminal thinking focus targets this distorted thinking which supports and motivates actions. Problem solving and cognitive functioning failures have predicted reactive aggression as well as substance abuse (Fishbein, 2000; Giancola, et.al., 1996; Giancola & Tarter, 1999). Executive cognitive functioning includes attention, cognitive flexibility, self-monitoring, and the capacity to learn from experience (Giancola, et al., 1996). In addition to executive cognitive functioning, "constructive thinking" should include the ability to use varied thinking styles and behavioral and emotional coping strategies.

Historically four behavioral approaches, now updated (*see* NIDA Tool Box, 2000; MATCH; 1999; *Addictions*, 1999), have been used in combination with methadone treatment and were systematically studied largely at the University of Pennsylvania and at Yale: (1) Drug counseling Woody et al. (1990); (2) Behaviorally oriented therapies including cognitive behavioral psychotherapy adapted from Beck et al. (1979); (3) Psychodynamically oriented psychotherapy including supportive-expressive therapy developed by Luborsky (1984); and (4) Interpersonal psychotherapy designed by Rounsaville, Gawin and Kleber (1985). Each of these therapies were effective alone or in combination with other types of treatment (Kaufman and Kaufman, 1979; Stanton et al., 1982; Woody, Luborsky, McLellan, O'Brien, Beck, Blaine,

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Herman and Hole, 1983, 1987.) Specific therapeutic approaches have also been examined for cocaine users (NIDA, 1991). Project MATCH examined the effectiveness of three specific treatment approaches for alcohol abuse and dependence including Motivational Enhancement Therapy, Cognitive-Behavioral Coping Skills Therapy and Twelve Step Facilitation Therapy (Nowinski, Baker & Carroll, 1994). Project MATCH therapies included behavioral approaches which were tried with a wide range of alcohol abusing and dependent client subjects with mixed findings. Two client characteristics have been consistently associated with negative outcomes of drug dependent patients — antisocial personality and psychiatric severity (Woody et al., 1985, 1987; Kadden et al., 1989; DeLeon et al, 1999). Drug abuse treatment has also been examined in large treatment follow-up studies — including CODAP, DARP, TOPS, and DATOS — and outcomes are better for those who remain in treatment longer (Leukefeld, Pickens & Schuster, 1992). Leukefeld, Pickens & Schuster (1992), when reporting the findings of a review of improving drug treatment approaches indicated that therapists should receive training related to assessment, diagnosis, and specific treatment interventions focused on behavior change. For cocaine interventions, the NIDA Clinical Toolbox: Science-Based Materials for Drug Abuse Treatment Providers begins to meet that need with three manuals.

Skills training which increases personal control can be effective in reducing drug and alcohol use and preventing relapse (Tims, Leukefeld & Platt, 2000). For example, those situations which can be the greatest risk for relapse are anger and frustration, social pressure to use drugs, negative emotional states, and stimulus elicited craving (Marlatt & Gordon, 1980). Various studies also have linked successful recovery with the ability to deal with the external and internal environment (Litman, et. al., 1979; 1983; Rist & Watzl, 1983). In summary, although there is literature focused on drug/crime interventions (Leukefeld, Tims & Farabee, 2002) and there is a literature on specialized populations, clinical research focused on criminal justice clients has been limited.

Criminal Justice Drug Abuse Research in Kentucky

The following presents a series of criminal justice studies carried out by the University of Kentucky, particularly the Center on Drug and Alcohol Research which begins to establish a foundation for developing empirically grounded and tailored interventions for Kentuckians.

Drug Abuse Among Kentucky Prisoners and Arrestees

Data were collected using face-to-face structured interviews with a stratified representative random sample of 600 Kentucky inmates (567 males and 33 females) (Center on Drug and Alcohol Research, 1977) with Federal Center for Substance Abuse Treatment State Needs Assessment support. In face-to-face interviews, Kentucky prisoners self-reported that over one-third (36%) had injected a drug and 43% reported that they had used needles. In addition, 92% of these adult prisoners reported they had ever used an illegal drug and 61% had used an illegal drug in the month before they were incarcerated. The use of specific illegal drugs were also quite common among Kentucky prisoners with Marijuana use at 87%, Cocaine use at 62%, heroin use at 24%, and crack use at 35%. In another study, data were also collected using face-to-face structured interviews with a stratified representative random sample of 307 incoming Kentucky arrestees (241 males and 66 females) in six county jails (Center on Drug and Alcohol Research, 1997b) with Federal Center on Substance Abuse Treatment State Needs Assessment funding. In personal interviews, Kentucky arrestees self-reported that almost three-fourths (74%) had used an illegal substance at the time of their arrest. The use of specific illegal drugs among Kentucky arrestees was common with 69% reporting Marijuana use, 30% reporting Cocaine use, 7% reporting Heroin use, and 15% reporting Crack use.

Prisoners and Health Services

Using an offender based health services framework (Leukefeld et al., 1998), health services problem data were examined from 177 chronic drug abusers and 232 other prisoners from four Kentucky prisons (Leukefeld et al, 1999b). The overall average age was 32.5%, 97% were white, 54% were single, and the average education was 11.7 years. Twelve health problems were examined and differences in proportions between chronic drug users and other prisoners in the proportion reporting ever having health problems were analyzed by eight categories of drug use. As expected, the number of health problems was significantly greater for chronic drug abusers. Because the relationship between drug use and health problems may be partially accounted for by demographic factors, the effects of each drug category was examined on total health problems while controlling for race and age. Results revealed that the use of each drug, except marijuana, remained significant on total health problems. Another analysis from 228 substance using offenders from four Kentucky state prisons who were not in treatment — with 15.4% from very rural counties, 14% from non-metro counties and 70.6% from metro counties-revealed that the proportion using drugs in the 30 days before incarceration differed significantly across this rural-urban continuum for four drugs: marijuana, inhalants, sedatives and amphetamines (Warner & Leukefeld, 1999). As expected, Marijuana use was highest in the very rural areas and lowest in urban areas. Heroin, although not significant, reflected the same pattern as inhalants, being highest in urban areas. Heroin, although not significant reflected the same pattern as inhalants, being highest in urban areas. Differences in thirty-day use prior to incarceration were also noted for alcohol use, alcohol use to intoxication, marijuana use, and multiple drug use. For each of these categories, respondents in very rural areas used more days than subjects from either metro or urban areas. When treatment differences were examined, the average number of times respondents had been in treatment varied significantly with very rural and metro respondents having the lowest number of treatment episodes. This finding supports the need to study drug abuse and interventions. Several addi-

tional project publications indicate that there is an association between drug use with health problems and health utilization (Staton, Leukefeld & Logan, 2000; Logan, Walker & Leukefeld, 2001; Leukefeld, Staton, Hiller et al., 2002).

HIV Prevention and Criminal Justice

Using data from the Federally funded National Institute on Drug Abuse Cooperative Agreement, Farabee et al. (1997) examined the likelihood that drug abusers would receive HIV/AIDS prevention information and supplies (*e.g.* condoms and bleach) in Kentucky. 1,135 community contacted and out-of-treatment injectors and crack users were included. 84% reported being arrested and 54% reported having received substance abuse treatment. It was hypothesized that involvement with the criminal justice system or substance abuse treatment would be associated with greater exposure to HIV/AIDS prevention information and/or supplies. However, despite high HIV risk among criminal justice and substance-abusing populations, incarceration and substance abuse treatment were only minimally associated with prior HIV prevention exposure or HIV testing. The importance of accessing and outreach for women was supported by a study which compared women crack users who reported exchanging sex for drugs and money with women crack users who did not exchange sex for drugs and money (Logan, Leukefeld, and Farabee; 1998). Results indicated that both women crack users who did not exchange sex had similar drug use patterns and had initiated drug use at similar ages. However, women who exchanged sex had more sexual partners, had unprotected vaginal and oral sex more often, and had a higher rate of STDs than women who did not exchange sex. Aggressive HIV prevention and drug treatment outreach was examined by Farabee, Leukefeld, and Hays (1998) with national data, which included Kentucky, from a sample of 2,613 injection drug users from 21 U.S. cities. Analyses on injectors who tried but were unable to enter treatment revealed that program-based reasons (*e.g.*, no room, too costly, stringent admission criteria) were the most commonly given barriers to drug treatment (72%). These data support the need for alternative HIV prevention outreach, such as accessing probationers who are the largest group in the criminal justice system.

Drug Court Evaluation

A two-phase process evaluation was completed (Logan, Leukefeld & Williams, 1999) of the Kentucky Drug Courts. The process evaluation included interviews with administrative personnel from Fayette County and Warren County Drug Courts with 7 judges, surveys and face-to face interviews with 32 clients and, surveys of: All Drug Court staff; defense attorneys; prosecutors; probation and parole offices; Jailers; and police departments. In all, 98 different individuals across both sites representing 10 agency perspectives were interviewed. Fayette County Drug Court participants (n=91) are 67% African American, 32% female, and 31% white with the average age of 32, with ages ranging from 18-62 years old (Logan, Leukefeld & Williams, 1999). Approximately 57% of the clients have children and 22% are married. Before entering Drug Court 23% were employed full time and 4% were employed part-time; after Drug Court program 74% were working full time. The average number of years of drug use was 10 and approximately 60% of clients had been in treatment before entering the drug court program. Participants had an average of 4 prior charges and had spent an average of 13 months in jail/prison in their lifetimes. When the initial group of Drug Court clients was examined, 42% graduated, 33% terminated in 1998 before graduation, and 25% remained in Drug Court. One of the biggest differences between those who graduated and those who terminated was employment. Other factors included: age, time to serve, whether they have served any substantial amount of time in prison/jail previously, admission of an addiction problem, family support of recovery, level of commitment, and social functioning. Findings were parallel for the Warren County Drug Court except Warren Drug Court participants were 26% African-American, 73% white with an average age of 26, ranging from 18 to 52 years old. Approximately 53% of the clients had children. The average number of years of drug use was 8.5 years and almost 52% of the clients had been in previous drug treatment.

Drug Court and Employment

The overall goal of a federally supported study is to examine a Drug Court employment intervention focused on obtaining, maintaining and upgrading employment. Data are being collected at baseline, 12 months, 18 months and 24 months. Employment is an important part of drug abuse treatment that is also used to measure treatment outcome; however, there is limited information available about the association between employment, drug use and outcome. Employment and employment problems were examined for 120 participants who were interviewed at Drug Court entry. Two groups were compared — those participants employed full-time and those working part-time (Leukefeld et al., 2000; 2001). It was hypothesized that drug abusers employed full-time would report different types of employment problems and less drug abuse. Overall, findings indicated that drug abusers employed full-time and part-time were not very different. Although those employed full-time had more jobs in the previous five years (5.1 vs. 3.8), there were no differences in employment problems at 30 days or 12 months before entering Drug Court. There were also no differences in the two major types of jobs held (construction and cook) between those employed full-time and part-time. There was only one difference in 12 drug categories examined – years of opiate use was significantly higher for those employed full-time (6.5 vs. 2.3 years). However, those employed full-time reported fewer problems with heroin and other opiates used (3.4% vs. 15%). Clearly, based on these preliminary data, these limited differences suggest that employment status may not be as protective as previously thought.

Victimization and Violence

Studies have focused on understanding criminal justice and victimization experiences as well as violent perpetration. Lo-

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-gan, Walker & Leukefeld (2001) analyzed Kentucky statewide data on drug use among a random sample of domestic violence arrestees. Results showed that significant proportions of males arrested in urban and rural areas used drugs and alcohol. About 50% of both urban and rural males had prior drug charges, but rural males were significantly more likely to have subsequent drug charges one year after their arrest. In another study, Logan, Walker & Leukefeld (2001), examined police attitudes about domestic violence to determine whether their view of psychosocial problems was generalized to all types of offender problems or if it was specific to drug problems. Results indicated that while incarceration was ranked number one for all types of offenders, treatment options were viewed more positively for domestic violence offenders that for any other type of offender, indicating that police officers may view domestic violence as more of a social problem than a criminal justice problem.

Concluding Remarks

The relationship between drugs and crime is well established. Although we know something about treating drug abusers, interventions have not been systematically developed in Kentucky for the chronic and relapsing disorder of drug abuse. Interventions have been developed in the U.S. but with limited study and examination in the Commonwealth. It is our hope that criminal justice information can be used to define successful interventions for citizens of the Commonwealth.

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Increased Funding for Defendants

Governor Patton's leadership on funding for indigent defense in Kentucky has been outstanding. By placing $10 million dollars into his 2000 budget to raise the funding level for the Department of Public Advocacy, he made an important and visionary statement about the importance of public advocacy for indigents. Every lawyer in this state should be grateful to him.

Richard H.C. Clay
Past-President, Kentucky Bar Association
Blue Ribbon Group member

Kentucky Drug Courts Increase in Kentucky; Evaluation Conducted

Over half the state has begun planning or operating drug courts at the adult and/or juvenile level since the Drug Courts department of the Administrative Office of the Courts was established in 1996. This unprecedented growth is a testament to the program's success. Each drug court is a grassroots effort with judges leading teams of local criminal justice officials, treatment and service providers, and community representatives to develop a program that works in each respective jurisdiction. Over 70 graduation ceremonies have been conducted on a statewide basis.

Drug Courts have been endorsed for continuation and expansion by the Criminal Justice Council, House Bill 843 Committee, and Kentucky Agency for Substance Abuse Policy. A recent Kentucky Treatment Outcome Study funded by the Division of Substance Abuse showed $8 is saved for every $1 spent on treatment services.

On August 2, 2000, the Conference of Chief Justices and the Conference of State Court Administrators adopted resolutions "in support of problem-solving courts," with well-functioning drug courts representing the best practice of the principles and methods of therapeutic jurisprudence. In June 2001, Chief Justice Joseph E. Lambert was the first Chief Justice elected to the National Association of Drug Court Professionals Board of Directors.

In August 2001, the Justice Department reported the first decline in the number of inmates in state prisons since 1972 and attributed this in part to "new attitudes about offering drug offenders treatment instead of locking them up." Bureau of Justice Statistics, the statistical branch of the Justice Department, found that 82% of people on parole who are returned to prison are drug and alcohol abusers, 40% are unemployed, about 75% have not completed high school and 19% are homeless.

David Gilbert, Kentucky Deputy Director of the Appalachia High Intensity Drug Trafficking Area, stated in an April 29, 2001 *Herald-Leader* article, "it would help if the state had more drug courts, so meth addicts could be directed into treatment. If you don't have the markets, you won't have the producers."

Fayette Drug Court is a National Association of Drug Court Professionals/Community Oriented Policing Services Mentor Court and Jefferson Drug Court was a National Association of Drug Court Professionals/Drug Courts Program Office Mentor Court. Both are national training sites.

Chief Justice Joseph Lambert

Chief Justice Joseph E. Lambert was honored by the Congress of Drug Court State Associations in February 2000 "for leadership, commitment, and setting an example for drug courts across the nation." Chief Justice Lambert accepted the first annual award presented by the National Association of Drug Court Professionals in June 2000 for outstanding accomplishments in recognizing "National Drug Court Month" throughout the Commonwealth. Kentucky was runner up for the same award in 2001 and 2002. At the request of Chief Justice Lambert, Governor Paul E. Patton has signed a drug court proclamation in Kentucky each of the last five years.

The Division of Substance Abuse presents Straus awards to recognize outstanding achievements at the annual Kentucky School of Alcohol and Other Drug Studies. Chief Fayette Circuit Judge Mary Noble received a Straus award in 1998; Kenton Circuit Judge Gregory Bartlett, in 1999; and Administrative Office of the Courts Drug Courts Manager, Lisa Minton, in 2001.

AOC and the University of Kentucky Center on Drug and Alcohol Research have developed an automated drug court management information system (MIS) to be utilized in processing drug court cases. The MIS will meet program needs

Judge Mary Noble

Judge Gregory Bartlett

Lisa Minton

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by collecting standard and relevant information throughout the state. Up-to-date information will allow the MIS to produce monthly, quarterly, and annual statistical reports that can be used to help rate the overall effectiveness of the drug court program.

Over 50 drug free babies have been born to mothers and fathers involved in Kentucky's drug courts. The Department of Health reports that for every drug-addicted baby born, $250,000 in medical expenses is incurred. This figure does not include babies born with fetal alcohol syndrome, which is even higher.

Employment is required of Kentucky's drug court participants and the programs work with other agencies to improve employment skills and opportunities. The participants contribute to society, support their families, and paid over $90,000 toward restitution, child support, court costs, fines, and other obligations last year. A $1.9 million, 5-year grant awarded to the Center on Drug and Alcohol Research by the National Institute on Drug Abuse (1 of 6 in the country) for Enhancement of Drug Court Retention Through Increased Employment Skills in Warren and Fayette counties.

Nationally acclaimed researcher Steven R. Belenko concluded the drug court evaluation results are consistent with the studies reviewed in 1998, indicating that drug courts, compared to other treatment programs, provide more comprehensive supervision and monitoring, increase the rate of retention in treatment, as well as reduce drug use and criminal behavior while participants are in the drug court program. The update also found that drug courts are handling more serious offenders, successfully retaining these complex offenders in treatment, reducing rearrests, both during the program and after graduation.

The National Institute of Justice (NIJ) has found that only a quarter of drug users in prison were previously in treatment. The number of drug using arrestees who are in need of treatment exceeds two million a year. Periods of incarceration alone do not change the drug use behavior-between 60 and 75% of untreated parolees who have histories of cocaine and/or heroin use are reported to return to those drugs within 3 months of release. Marijuana is more readily available than alcohol according to a drug survey of 10th and 12th graders in a Covington, KY high school.

Adult Drug Courts

Number of	Actual FY 1999-00	Actual FY 2000-01	Actual FY 2001-02	Estimated FY 2002-03	Estimated FY 2003-04
Referrals	673	748	952	1,104	1,334
Assessments	479	700	821	1,025	1,238
Eligible participants	393	532	709	1,109	1,341
Group meetings	5,689	6,918	13,878	14,669	15,274
Individual sessions	10,973	14,542	15,755	19,256	22,495
Family sessions*	557	530	813	823	1,030
Residential referrals	218	314	432	480	620
Ancillary service referrals	573	827	1,142	1,599	1,974
Enrolled in school/GED	127	154	108	230	300
Enrolled/graduated college	12	18	27	41	66
Home visits conducted*	942	1,136	9,243	10,775	12,219
Employment site visits	670	928	5,834	6,450	7,813
Drug tests	33,172	45,505	60,698	63,789	76,482
Restitution collected*	$5,679	$6,247	$15,817	$19,763	$22,203
Fines/court costs collected*	$24,929	$16,747	$29,960	$35,979	$37,475

*** Jefferson County Drug Court not included.**

Juvenile Drug Courts

Number of	Actual FY 1999-00	Actual FY 2000-01	Actual FY 2001-02	Estimated FY 2002-03	Estimated FY 2003-04
Referrals	18	24	101	240	310
Assessments	16	22	93	136	200
Eligible participants	14	20	84	100	150
Group meetings	180	200	1051	1208	1508
Individual sessions	1000	1100	1979	2500	2700
Family sessions*	500	1000	454	560	750
Residential referrals	2	3	35	50	85
Ancillary service referrals	16	12	65	90	120
Enrolled in school/GED	14	16	74	88	100
Enrolled/graduated college	1	0	1	1	1
Home visits conducted*	800	2000	3409	4020	4520
Employment/School visits	18	52	2020	2560	2790
Drug tests	1400	1800	8152	13000	9000

Outcome Evaluation

The University of Kentucky Center on Drug and Alcohol Research performs the evaluations of all drug courts in the Commonwealth. To date, 22 process evaluations have been completed, with an additional five currently being conducted. Four help manuals have been developed and 5 Kentucky Drug Court articles have been published in national journals. Drug Courts was featured in the January 2001 *Bench and Bar*.

Chief Justice Joseph E. Lambert and the Administrative Office of the Courts (AOC) were pleased to release the first outcome evaluation of Kentucky Drug Courts in November 2001. This report was commissioned by the Administrative Office of the Courts to determine the effectiveness of Kentucky's Drug Courts. Dr. TK Logan, Associate Professor at the University of Kentucky Center on Drug and Alcohol Research (CDAR), conducted the study of the first three adult drug courts established in the state. This study includes an extensive review of program results and cost savings to taxpayers in the state. The sites are located in Jefferson, Fayette, and Warren counties. Findings include:

The 3 sites are serving 64-73% male clients, 40-64% are African-American in their early 30s.

The cost savings to the Commonwealth of 586 graduates equals $7,060,900 (586 graduates x $14,691 [1 year in prison] =$8,609,100; 586 graduates x $2,642 [1 year in drug court]=$1,548,200).

For every $1 spent on a graduate there is a cost savings of $3.30-$5.58 in a one year period to the taxpayer through "avoided" costs to society such as arrest and conviction costs, incarceration costs, child support payments, and increased annual earnings.

This study includes established evaluation methods used in other studies of Drug Courts but also includes a detailed examination of other factors relating to program effectiveness. This study used: (1) a 12-month post-program follow-up time period for 745 drug offenders from the three sites examined in three groups—graduates, drop-outs, and a quasi-control group of individuals assessed who did not enter the Drug Court program; (2) 14 different data sources from four main areas—in program, criminal justice, supplemental data, and interviews; and, (3) interviews with a random sample of 136 graduated and dropped-out program participants from all three sites.

This study, conducted by Drs. TK Logan, William Hoyt, and Carl Leukefeld, found that Drug Court involvement was associated with reductions in costly incarcerations and the use of mental health services. It also found reduced legal costs associated with criminal charges and convictions. In addition, there was an increase in participant earnings and in child support payments – both of which give evidence of more productivity by the graduates. ■

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Figure 1. Avoided Cost Savings for Each Dollar Spent for Graduates

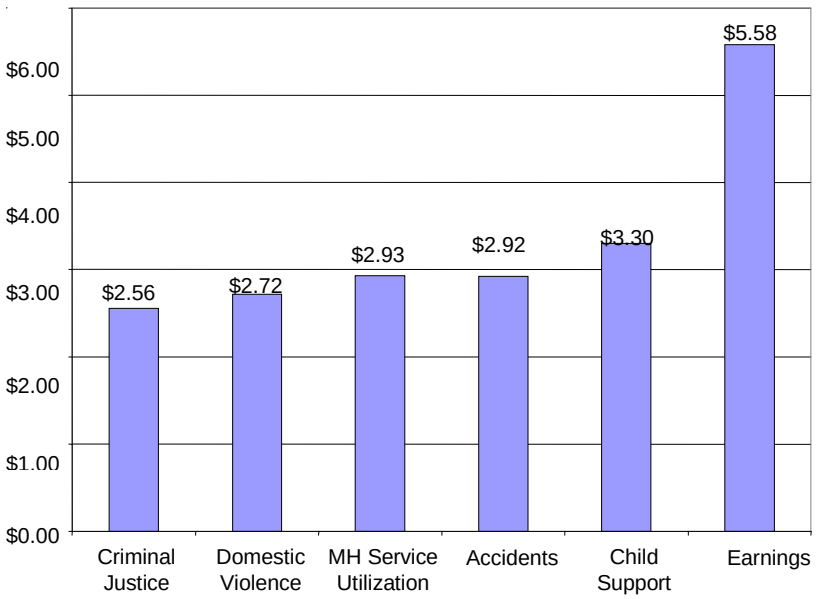

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Figure 2. Percent of groups with any incarceration 12-months after exiting the Drug Court Program

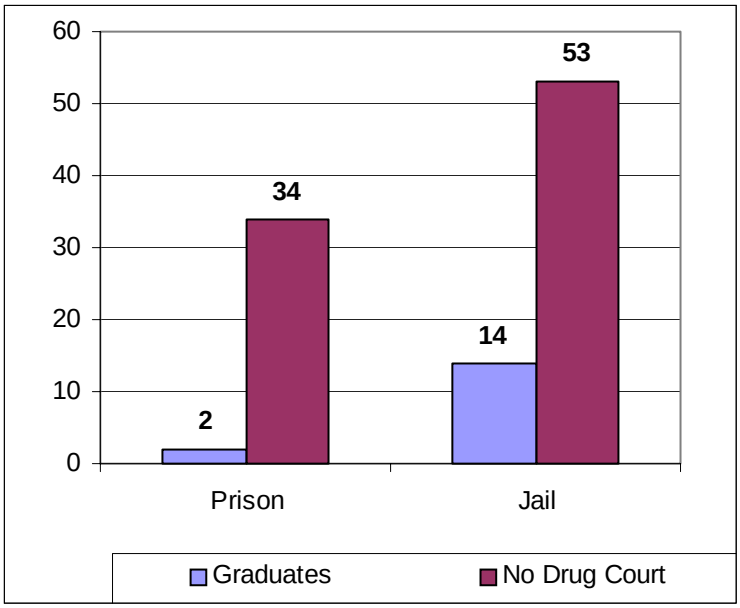


Figure 3. Percent of groups with charges and convictions 12-months after exiting from the Drug Court Program

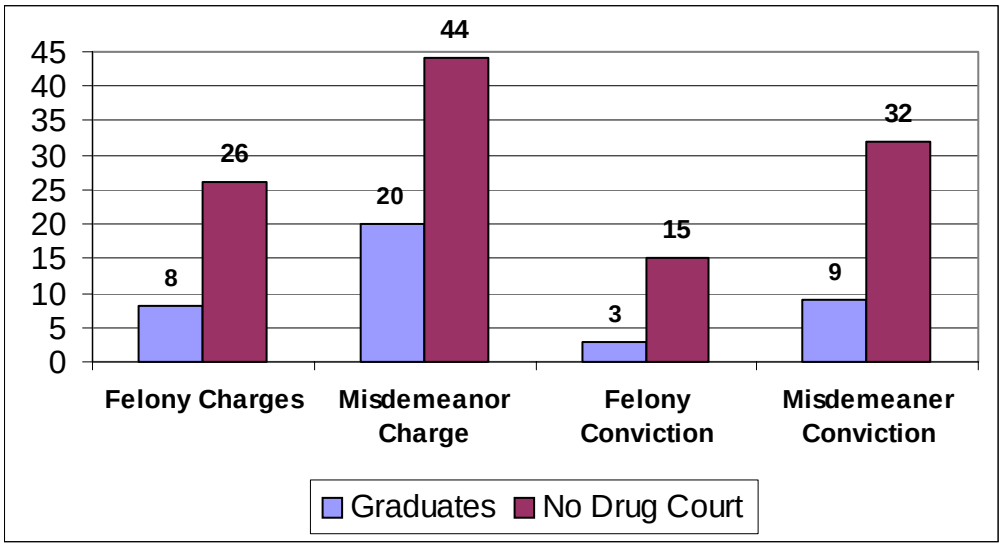
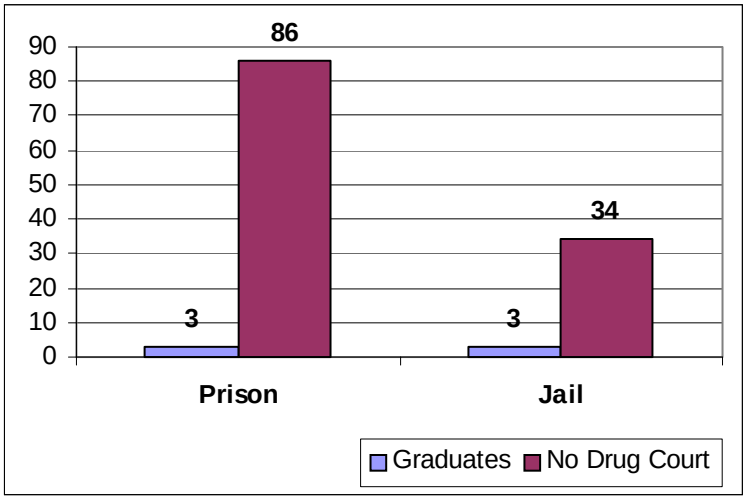


Figure 4. Days incarcerated by group 12-months after exiting the Drug Court Program



The Use of the Racial Profiling Act in Drug Cases

Ernie Lewis, Public Advocate

Steve Bright has said that "racial bias influences every aspect of the criminal justice system. African-Americans, Latinos and members of other racial minorities are more likely than similarly situated white people to be stopped by the police, to be arrested after being stopped, put in choke holds by arresting officers, denied bail, denied probation and given harsher sentences including the death penalty."

What Steve Bright says is true today in Kentucky. African-Americans are being stopped on interstates based in whole or in part upon their appearance. Thereafter, they are being asked for consent to search their vehicles. Minority juveniles are being detained, committed, and transferred to circuit court in disproportionate numbers. Law enforcement is going into minority neighborhoods to conduct drug stings. Minorities are receiving higher bail, being denied probation and alternative sentences, and being given higher sentences than similarly situated white defendants. Capital punishment is rife with racial discrimination, as found by University of Louisville Professors requested by the General Assembly to look into the issue in the early 1990s. Our juvenile and adult facilities contain a disproportionate number of racial minorities. Racial discrimination is a fact of life in the American criminal justice system, and in Kentucky.

One of the most insidious acts of racial discrimination in the criminal justice system is the act of racial profiling. This is particularly a problem in cases involving illegal drugs. Racial profiling itself was developed primarily as a tactic in the War on Drugs. Racial profiling was taught to young officers as a means to find drug traffickers. "Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops. "Race, Cops, and Traffic Stops," 51 *University of Miami Law Review* 425 (1997). This article will address some of the ways of attacking this problem, with a focus on the recently adopted Kentucky Racial Profiling Act. It is meant to be a starting point for thinking about the issue, not a full explication of the various means for attacking this practice.

What Can We Do About Racial Profiling in Kentucky to Defend Our Clients Who Have Been Charged With a Drug Offense?

Lawyers who are part of a community can oppose this common law enforcement practice. They can take a stand as citizens against racial profiling. More to the point, they can use all of the tools available to them to tackle this practice while at the same time advocating zealously for their client.

The Kentucky Constitution

The first place to look is in the Constitution of Kentucky. Some of the sections most applicable to this topic read:

"Section 1: All men are by nature free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: the right of enjoying and defending their rights and liberties; Third: The right of seeking and pursuing their safety and happiness.

Section 2: Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

Section 10: The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

The Kentucky Constitution appears to clearly prohibit the act of racial profiling by its plain meaning. Counsel should cite Section 1 to argue that being stopped based in whole or in part upon race or national origin violates a constitutional right to be free and equal, as well as the right to pursue safety and happiness. Section 2 should be used to demonstrate that the stopping of a minority person based not upon their acts but rather upon their "profile" is the exercise of arbitrary power over the liberty and privacy of the person being stopped. Section 10 should be used in its traditional fashion, to argue that the stopping of a person based not upon probable cause or a reasonable and articulable suspicion but rather based upon racial status is violative of the person's constitutional rights. Section 10 appears broader than the Fourth Amendment, although the Kentucky appellate courts generally view them as identical. Be that as it may, counsel should continue to assert a more expansive interpretation of Section 10.

The United States Constitution

One place to look in the United States Constitution is the Fourteenth Amendment with its rich history. As far back as in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court stated that "[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

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Counsel should cite the Fourteenth Amendment's Equal Protection and Due Process Clauses to argue that a stopping based upon race is fundamentally unfair and a denial of equal justice.

Yet counsel must be aware of the difficulty of litigating a racial issue in a drug case using the Fourteenth Amendment. "Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Proteciton Clause…even if we assume arguendo that the Fourteenth Amendment does provide such an exclusionary remedy, it is plain that Chavez has failed to offer proof of discriminatory purpose, a necessary predicate of an equal protection violation. *See Washington v. Davis*, 426 U.S. 229, 239-42, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)." *United States v. Chavez*, 281 F. 3d 479 (5th Cir. 2002); *United States v. Armstrong*, 116 S. Ct. 1480 (1996). "A 'racial profiling claim under the Equal Protection ***164 **655 Clause is difficult, if not impossible, to prove' (Beck and Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns, 72 Temp.L.Rev. 597, 612 [1999])." *People v. Robinson*, 741 N.Y.S.2d 147 (N.Y.2001).

The Fourth Amendment should offer more specific protection than the Fourteenth Amendment. One would think that the act of stopping a person or pulling over his car based upon race would present the quintessential Fourth Amendment violation. "[T]he Fourth Amendment should prohibit either a system which gives an officer the discretion to engage in racial profiling or a system that yields a disproportionate number of suspicionless minority seizures and searches. A Fourth Amendment remedy is therefore appropriate to curb the abuses." Oliver, "With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling," 74 Tulane Law Review 1409 (2000). There are some good cases indicating that the War on Drugs does not suspend the Fourth Amendment. *See for example City of Indianapolis v. Edmond*, 531 U.S. 32 (2001), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). *State v. Washington*, 760 N.E.2d 866, Ohio App. 8 Dist (2001) demonstrates how evidence of racial profiling can benefit a traditional Fourth Amendment claim decided on other grounds. "Although *494 Washington did not present evidence to support an equal protection violation, the fact that he was stopped for investigation on such flimsy grounds certainly raises questions concerning the propriety of allowing stops predicated on generalized profiles."

However, the United States Supreme Court has more often than not interpreted the Fourth Amendment in such a way as to cause significant problems to defense counsel. Among the problem cases are the following:

- *Whren v. United States*, 517 U.S. 806 (1996). Under *Whren*, pretext and motive for a stopping are irrelevant. "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." This case in its starkest terms gives the go-ahead to racially profile so long as the officer can articulate probable cause. Since well over 50% of us at any given time are violating some sort of traffic law, compliance by law enforcement with *Whren* is not difficult, irrespective of motive.
- *Illinois v. Wardlow*, 528 U.S. 119 (2000). The Court holds that presence in a high crime area and flight from a police officer constitute reasonable suspicion. The dissent notes that "among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'"
- *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Police may make a warrantless arrest for a first time seat belt offense
- *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). A driver arrested for a traffic offense can be forced out of a car.
- *Maryland v. Wilson*, 519 U.S. 408 (1997). A passenger can be forced out of the car.
- *Ohio v. Robinette*, 519 U.S. 33 (1996). Officer who has arrested driver for speeding does not have to tell driver he is free to go prior to asking for consent.
- *United States v. Knights*, 122 S. Ct. 587 (2001). A police officer may conduct a probationary search for investigatory purposes.
- *United States v. Sokolow*, 490 U.S. 1 (1989). The Court justifies a *Terry* stop based almost exclusively on a drug courier profile.

These cases provide all the tools the police need to racially profile and make it stick.

The point is made nowhere better than by Justice O'Connor in her dissent in *Atwater*: "As the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an exercise for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."

The Kentucky Racial Profiling Act

Kentucky defense attorneys no longer need limit themselves to either the state or the federal constitutions. Nor should they be deterred by the interpretation of these amendments that appear to allow racial profiling.

Kentucky defense attorneys have been given a significant tool to deal with these problematic Supreme Court cases in the context of racial profiling. It is the Kentucky Racial Profiling Act.

Kentucky's Racial Profiling Act addresses many of the problems with the interpretation of the Fourth Amendment by the US Supreme Court. The Racial Profiling Act modifies *Whren* in Kentucky. While motive is not to be considered in the reasonable suspicion calculus under *Whren*, under the Racial Profiling Act, MOTIVE is THE issue. The Act makes patrolling in a high crime area, evidence of reasonable suspicion in *Wardlow*, possible evidence of racial profiling under the Act. It allows for counsel to demonstrate patterns of requesting consent, patterns of asking passengers to get out of cars, and other improper coercive devices, in order to prove improper motive.

KRS 15A.195 reads in part: "(1) No state law enforcement agency or official shall stop, detain, or search any person when such action is solely motivated by consideration of race, color, or ethnicity, and the action would constitute a violation of the civil rights of the person."

KRS 15A.195 (2) requires a model policy to be developed and disseminated "to prohibit racial profiling by state law enforcement agencies and officials." The policy must be disseminated to all law enforcement in Kentucky. In turn, each law enforcement agency in Kentucky that participates in KLEFP must write their own policy banning racial profiling. The local policy must be at least as stringent as the model policy. Law enforcement agencies must also have an administrative action for officers "found not in compliance with the agency's policy."

Model Policy

The model policy required by the statute has been developed. The policy makes the protection and preservation of constitutional and civil rights a "paramount concern of government and law enforcement." The policy states clearly that the "law enforcement personnel shall not engage in any behavior or activity that constitutes racial profiling. The decision of an officer to make a stop or detain an individual, or conduct a search, shall not be solely motivated by consideration of race, color, or ethnicity. Stops, detentions, or searches shall be based on articulable reasonable suspicions, observed violations of law or probable cause…"

Racial profiling is defined as: "a process that motivates the initiation of a stop, detention, or search which is solely motivated by consideration of an individual's actual or perceived race, color, or ethnicity, or making discretionary decisions during the execution of law enforcement duties based on the above stated considerations. Nothing shall preclude an officer from relying on an individual's actual or perceived race, color, or ethnicity as an element in the identification of a suspect or in the investigation of a crime, a possible crime, or violation of law or statute."

The RPA in Practice

Under the Act, **any behavior** that constitutes racial profiling is prohibited. This allows counsel to use her imagination to demonstrate racial profiling. The creation of a sting crafted by the prosecutor and local police for an African American neighborhood would be "behavior" that could be outlawed under the Act. A roadblock crafted to pull over only those persons with migrant workers in trucks would be covered. A hospital policy crafted with law enforcement to take blood samples from crack babies or their moms would fall within the Act.

Counsel for the defense must prove two things under the Act. First, counsel must prove that the stop, detention, or search was solely motivated by race, color, or ethnicity. Second, counsel must prove that the stop, detention, or search violated the person's civil rights.

The burden of proof is on the defendant on both counts. How does one prove that the act was motivated "solely" by race, color, or ethnicity? Certainly, common sense should prevail here. The circumstances of the behavior, the context for the stop, the officer's previous patterns of behavior, all will come into play.

How does one prove that the stop violated the person's civil rights? Again, common sense should be the guide. While there is no definition of a civil rights violation, certainly a violation of a person's privacy rights and rights to equal protection and due process constitute civil rights.

The Act gives our clients standing when they otherwise might not have it. If the officer pulls over a car full of Hispanic men, the search of the passenger area of the car which produces narcotics might violate the RPA even where under normal analysis the passenger might not have standing.

The Stop

The RPA applies to stops. This is particularly applicable to traffic stops, although it is not confined to them. Obviously, if the officer cannot articulate a good reason for stopping your client, then the case is easy even under standard Fourth Amendment and Section analysis. The difficulty comes when

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the officer has probable cause or an articulable suspicion that your client has committed a traffic offense. One approach for proving that a stop is motivated by race is to conduct a study. A study on stops on the New Jersey turnpike showed that while blacks constituted 15% of the drivers, they were 70% of those stopped. In that context, a traffic stop of a minority person should be viewed as primarily motivated by race.

A study can demonstrate that there is a pattern of treating minorities committing an offense differently than whites committing an offense are being treated. In a study of I-95 in Maryland, 80% of those stopped were a racial minority. 92% of whites and 96% of blacks were observed to be committing a traffic infraction at a given time. Can the officer articulate a reason why he stopped this particular individual who was driving 10 miles over the speed limit when he did not stop others who were not in a minority?

The Detention

The RPA also covers the detention. While an officer may be able to articulate reasonably why a driver was stopped, can he likewise demonstrate why he detained the driver for longer than normal? This gets us past the probable cause of the traffic violation. Can the officer articulate why minority drivers are asked for consent more than white drivers? Can the officer articulate why minority drivers are detained for the arrival of drug-sniffing dogs more than are similarly situated whites?

We should require as a matter of state law that there be a reasonable suspicion before asking for consent; in addition we should be requiring the motorist to be told he is free to leave without the giving of consent.

The Search

The third category the Act applies to is the search. Data from St. Paul, Minnesota shows that black motorists are more likely to be frisked and searched as a result of a traffic stop than are whites. We need to require the officer to demonstrate why our clients were frisked and searched. We need the officer to articulate why this is occurring more with minority drivers than with white drivers.

This also applies to pedestrians. Are minority pedestrians being frisked more than white pedestrians are? Are there different patterns used with minority youth in crowds than with white youths? When white youths leave upon the arrival of the police, are they stopped and frisked in a similar pattern to black youths?

Violation of Civil Rights: 1981

One place to borrow for a definition of violation of civil rights is in federal law. 42 USC Section 1981 prohibits racial discrimination in making of private and public contracts. This law requires a showing that the plaintiff is a racial minority and that the defendant discriminated against the plaintiff with intent to discriminate on the basis of race.

"Intentional discrimination on the basis of race is a necessary element of a section 1981 claim." *DiGiovanni v. City of Philadelphia*, 531 F. Supp. 141 (E. E. Pa. 1982)

Arrests motivated solely by race violate Section 1981.

Violation of Civil Rights: Section 1983

"'Section 1983 imposes civil liability upon any person, who acting under the color of state law, deprives another individual of any rights, privileges or immunities secured by the Constitution or laws of the US.'" *White v. Williams*, 179 F. Supp. 2d 405 (2002).

In *Williams*, the Court held that Section 1983 would encompass an allegation that 14th Amendment and 4th Amendment rights had been violated by the deliberate indifference of a Police Chief in regards to racial profiling, including the teaching of trainees to profile in order to make drug arrests.

42 USC Section 1985 & 1986

Williams also recognizes that Section 1985 claim may be made where there is a conspiracy motivated by race to deprive a person of equal protection.

Section 1986 provides a cause of action against persons who know of a conspiracy and fail to take action to frustrate its execution.

Exclusionary Rule

So what if the RPA is violated? There is no remedy in the Act, correct? I submit that the RPA implies that an exclusionary rule should exist, and thus that evidence obtained in violation of the Act should be excluded.

Mapp v. Ohio, 367 U.S. 643 (1961). This case applied the exclusionary rule to the states.

In *United States v. Leon*, 468 U.S. 897 (1984), the Court stated that "First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."

A good argument can be made that the Racial Profiling Act is likewise intended to deter police misconduct rather than the

judiciary. Thus, the exclusionary rule applied to the states should be used to deter the police from racially profiling in violation of the RPA.

It will be argued that KRS 15A.195(5) requiring local law enforcement to adopt an administrative sanction is the exclusive remedy for a violation of the RPA. There is nothing in the Act, however, to indicate that the only remedy for a violation is discipline of the officer. Kentucky Courts must be urged to create an exclusionary remedy under the Racial Profiling Act, arguing that the purpose of the exclusionary rule, and the purpose of the act, are both to deter unlawful police misconduct.

Application of the RPA

There are numerous potential applications of the RPA. These include:

- Traffic stops on the interstate
- Requests for consent
- Frisks for contraband and weapons
- Requests to see identification
- Drug stings in poor and minority neighborhoods
- Flight in poor neighborhoods that would otherwise be OK under *Wardlow*.
- Surveillance of housing projects
- Targeting of minority shoppers

What Do You Need to Litigate

This law is in its infancy. Counsel need to be sharing with one another those things that are required when litigation under the Act. At a minimum, counsel should have:

- The Model Policy
- Your local law enforcement policy
- Records of sanctions against individual officers
- The data on racial profiling, once it is published
- Discovery. "We hold that defendant is entitled to discovery in support of his claim of racial profiling…" *State v. Clark, N.J.*, 785 A. 2d 59 (2001).
- Create a study in your local area

In addition, defenders should begin to build a database in your individual offices on particular officers in order to prove particular patterns of stopping, detention, and arrest.

There are Victories in Other States Without a Racial Profiling Act

There are success stories from around the country where racial profiling is being found and remedied. For example:

- *State v. Carty*, 790 A.2d 903 N.J.(2002). NJ, 10/9/01: Held that under the New Jersey Constitution a consent search during a lawful stop of a motor vehicle is not valid unless there is a reasonable and articulable suspicion.
- *State v. Payton* 775 A.2d 740 N.J.Super.A.D. (2001). Following the *Interim Report* in New Jersey exposing racial profiling by the New Jersey State Police, the Court found that a "racial profiling defense" could be raised for the first time on appeal.
- *Hornberger v. ABC*, 2002WL 1058515(N.J. Super.A.D.) "We hold that the PrimeTime Live video program DWB was not defamatory. The program portrayed with reasonable accuracy a routine traffic stop of young African-American males, resolved ultimately by a warning and without traffic violation charges for several admitted violations, which was in reality a pretext to launch a criminal investigation without articulable suspicion, probable cause, or legal consent."
- *State v. Soto*, 734 A. 2d 350 (1996). "It is indisputable, therefore, that the police may not stop a motorist based on race or any other invidious classification…Where objective evidence establishes 'that a police agency has embarked upon an officially sanctioned or de facto policy of targeting minorities for investigation and arrest,' any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity…Statistics may be used to make out a case of targeting minorities for prosecution of traffic offenses provided the comparison is between the racial composition of the motorist population violating the traffic laws and the racial composition of those arrested for traffic infractions on the relevant roadway patrolled by the police agency."

Public Value in Litigating the RPA

There is much to be gained by litigating under the Racial Profiling Act. First, you might win! Second, there is an opportunity to make law by litigating under this new Act. Further, you may gain negotiating advantage by raising the issue. Few law enforcement officers want racial profiling evidence to be brought out, or racial profiling practices to be exposed. Finally, you may change the practice is your local area and thereby be building a more just community. ■

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Drug Cases, the Fourth Amendment and Section Ten

The best weapon defense attorneys have when faced with a charge of drug possession or trafficking is that the evidence was seized in violation of either the Fourth Amendment of the United States Constitution or Section Ten of the Kentucky Constitution. Often, suppression of the drugs is the only possible avenue of relief for many of our clients. Any review of important cases threatens the exclusion of others that are equally important. However, there are a few cases which counsel must know and use in defending a drug case. Some of these are listed below:

- *United States v. Leon,* 468 U.S. 897 (1984). In this case, the United States Supreme Court established the good faith exception to the exclusionary rule. The Kentucky Supreme Court adopted this in *Crayton v. Commonwealth,* Ky., 846 S.W.2d 684 (1993). Defenders representing clients who have been charged with drug offenses seized following the execution of a warrant must understand the good faith exception to the exclusionary rule.

- *Oliver v. United States,* 466 U.S.170 (1984). Here, the United States Supreme Court held that there is no reasonable expectation of privacy in the open fields area outside of the curtilage of the home. This case in particular has obvious implications for the numerous cases of cultivating marijuana that arise in Kentucky. A companion case is *United States v. Dunn,* 480 U.S. 294 (1987) wherein the Court held that a barn located sixty yards from the house was not part of the curtilage and thus was part of the open fields analysis.

- *California v. Greenwood,* 486 U.S. 35 (1988). The United States Supreme Court held that there was no reasonable expectation of privacy in a person's garbage that had been placed on the curb. Many of us have had cases in which probable cause to search a home was found following the search of garbage looking for drug paraphernalia and other evidence of drug use and drug trafficking.

- *California v. Hodari D.,* 499 U.S. 621 (1991). *Hodari D. is* significant in drug cases because the Court held that no seizure has occurred unless physical force has been used against the person. This case becomes important where our clients have been arrested without a warrant and evidence has been abandoned during flight from the police. *Hodari D.* tells us that unless physical force has been used against our clients that there may be no seizure and thus no Fourth Amendment implications.

- A series of cases establishing the right of the police to conduct inventories have serious implications in drug cases. *South Dakota v. Opperman,* 428 U.S. 364 (1976) held that a warrantless inventory of the glove compartment of an abandoned vehicle was reasonable. Thereafter, *Illinois v. Lafayette,* 462 U.S. 640 (1983) held that a warrantless search of a shoulder bag at the jail of a defendant arrested on disturbing the peace was a reasonable search. The third in the trilogy is *Colorado v. Bertine,* 479 U.S. 367 (1987) where the Court approved of an inventory search of a backpack seized from the van of a drunk driver.

- The special needs search has drug offense overtones as well. In *New Jersey* v. TLO, 469 U.S. 325 (1985), the Court approved of the search of school children without a warrant and without probable cause. Thereafter in *Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995) the Court approved of random drug testing of student athletes. This was extended to students participating in extracurricular activities in *Board of Education of Independent School District No. 92 of Pottawatomie County, et. al. v. Lindsay Earls et. al,* 112 S. Ct. 2559 (2002. In *Hudson v. Palmer,* 468 U.S. 517 (1984) the Court stated that there was no reasonable expectation of privacy in our nation's prisons and jails. In *Griffin v. Wisconsin,* 483 U.S. 868 (1987) the home of a probationer was searched without a warrant and the United States Supreme Court approved this search as reasonable. *United States v. Knights,* 534 U.S. 112 (2001) allows probationary searches to be conducted for purposes of an investigation.

- Probably the most important case with drug defense implications is *Terry v. Ohio,* 392 U.S. 1 (1968). There, the court approved of the stop and frisk without a warrant and without probable cause. The Court established the test as whether there is an articulable suspicion that a crime is occurring or has occurred. Thereafter, the Court in *Michigan v.* Long, 463 U.S. 1032 (1983) approved of the *Terry* search of a vehicle. In *United States v. Sokolow,* 490 U.S. 1 (1989) the Court approved not only of a *Terry* search in an airport but also implicitly approved of the use of the drug courier profile in *Terry* cases. In *Minnesota v. Dickerson,* 508 U.S. 366 (1993) the Court approved of the plain touch exception during a *Terry* stop. This was approved by the Kentucky Supreme Court in *Commonwealth v. Crowder,* Ky., 884 S.W.2d 649 (1994). In *Illinois v. Wardlow,* 528 U.S. 119 (2000), the Court approved of a *Terry* stop based upon flight from the police in an area known for high level of narcotics trafficking. In *Florida v. J.L.,* 529 U.S. 266 (2000), the Court held that an uncorroborated anonymous tip is not sufficient to allow for the stopping of a person meeting the description in the tip.

- In *Wilson v. Arkansas,* 514 U.S. 927 (1995), the Court announced that during the execution of a warrant, the knock and announce requirement is mandated as a matter of Fourth Amendment law. *Richards v. Wisconsin,* 520 U.S. 385 (1997) held that there is drug exception to *Wilson.*

- In *Kyllo v. United States,* 533 U.S. 27 (2001), the Court reaffirmed the viability of *Katz v. United States,* 389 U.S.

347 (1967), holding that the use of a thermal imaging device outside of a home to determine activity inside the home is a search.

- The Court has explored the parameters of roadblock searches, which are particularly useful devices to uncover drugs in vehicles. In *Michigan Department of State Police et.al. v. Sitz*, 496 U.S. 444 (1990), the Court held that a roadblock conducted to get drunk drivers off the road is constitutional. On the other hand, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2001) prohibits the use of a roadblock to check for drugs. The same reasoning was then applied to the seizing of urine samples from pregnant women for the purpose of uncovering the commission of a crime. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
- *Whren v. United States*, 517 U.S. 806 (1996) held that subjective pretextual reasons for making a stop is irrelevant so long as an officer has probable cause or a reasonable articulable suspicion. A warrantless arrest may occur even for a minor criminal offense such as failing to use a seatbelt. *Atwater v. City of Lago Vista*, 532 U.s. 318 (2001).
- *Paul v. Commonwealth*, Ky., *765* S.W.2d 24 (1989). Here, the Court held that a passenger in a car where marijuana was found may not be arrested and thereafter searched, thereby giving special protection to the passenger. *Wyoming v. Houghton*, 526 U.S. 295 (1999) held, however, that where there is probable cause that contraband is in the car or it containers, the police may search a passenger's personal belongings.
- The Court has focused considerably on bus passengers generally in the context of drug enforcement. *Florida v. Bostick*, 501 U.S. 429 (1991) allows for the police to board a bus to ask to search luggage without this being considered a seizure. A passenger does have a reasonable expectation of privacy in his luggage. *Bond v. United States*, 529 U.S. 334 (2000). In *United States v. Drayton et. al*, 122 S. Ct. 2105 (2002), the Court held that passengers as well could be questioned without probable cause or an articulable suspicion.
- A person who is being questioned does not have to be informed that they have a right to refuse to consent to a search. *Ohio v. Robinette*¸519 U.S. 33 (1996). ■

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Who is Winning the War on Drugs?[1]


Bryce Amburgey

It is well recognized that there is no "magic bullet" for America's drug problem. A diverse approach involving supply, demand, and treatment has emerged as a dominant theme in this arena. The Office of National Drug Control Policy (ONDCP), in the introduction to its 2002 *National Drug Control Strategy*, stated:

> Reduced to its barest essentials, drug control policy has just two elements: modifying individual behavior to discourage and reduce drug use and addiction, and disrupting the market for illegal drugs. Those two elements are mutually reinforcing.
>
> Drug treatment, for instance, is demonstrably effective in reducing crime. Law enforcement helps 'divert' users into treatment and makes the treatment system work more efficiently by giving treatment providers needed leverage over the clients they serve. Treatment programs narrow the problem for law enforcement by shrinking the market for illegal drugs. A clearer example of symbiosis is hard to find in public policy…Perhaps the greatest single challenge for our Nation in [the area of drug treatment programs] is to create a climate in which Americans confront drug use honestly and directly, encouraging those in need to enter and remain in drug treatment.

National Trends

According to the Bureau of Justice Statistics (BJS) in its *Drug and Crime Facts*, more than four-fifths of drug law violation arrests are for possession violations. In 1987 drug arrests were 7.4% of the total of all arrests reported to the FBI; by 2000, drug arrests had risen to 11.3% of all arrests. In 2000, according to the *Uniform Crime Reports*, law enforcement agencies nationwide made an estimated 14 million arrests for all criminal infractions except traffic violations. The highest arrest counts were 1.6 million for drug abuse violations, and approximately 1.5 million for driving under the influence. In the 1997 *Survey of Inmates in State and Federal Correctional Facilities*, 33% of state prisoners and 22% of federal prisoners said they had committed their current offense while under the influence of drugs. About 60% of mentally ill and 51% of other inmates in State prison were under the influence of alcohol or drugs at the time of their current offense. In 1998, an estimated 138,000 convicted jail inmates (36%) were under the influence of drugs at the time of the offense.

Continued on page 32

Continued from page 31

The BJS 2000 *Sourcebook of Criminal Justice Statistics* indicates that estimated arrests (by all law enforcement agencies submitting complete reports) in the United States for drug abuse violations rose 36.5% from 1990 to 1999. Drug offenses accounted for 34.8% of all felony convictions in state courts in 1996..The percent of the Federal prison population sentenced for drug offenses has generally risen sharply over the past thirty years with a leveling off in the last several years. Examples of the percentages are as follows: 1971: 17.0%; 1981: 25.6%; 1991: 56.9; 2001: 56.3%.

Juvenile Violent Crime Falling While Juvenile Drug Crime is Rising

The Office of Juvenile Justice and Delinquency Prevention reported several noteworthy statistics in its bulletin, *Drug Offense Cases in Juvenile Courts, 1989-1998*: In 1999, an estimated 1,557,100 arrests were made in which the most serious offense was a drug abuse violation. Persons younger than 18 years old accounted for 198,400 (13%) of these arrests. In 1999, "drug abuse violations" was the criminal offense category with the highest arrest rate (586 per 100,000 persons in the population). The juvenile arrest rate for the same category (arrests per 100,000 persons ages 10 to 17) was 649. While juvenile violent crime was dramatically decreasing between 1993 and 1998, the number of juvenile court cases involving drug offenses more than doubled during the same time period.

Kentucky: 44.9% of Arrests Involved Drugs or Alcohol

Crime in Kentucky[2] statistical reports published by the State Police for 1998 and 1999 indicated that the number of persons arrested in Kentucky for narcotic drug offenses constituted 9.2% and 10.3% of the state arrest totals in those respective years. Further, the drug arrests constituted 10.4% of all Part II Crime arrests in 1998 and 11.5% of all Part II Crime arrests in 1999.

Alcohol is often overlooked in the war on drugs. Alcohol abuse and addiction is a very serious problem in Kentucky. Examination of the State Police's 1999 *Crime in Kentucky* report reveals a fact that deserves significant attention from the criminal justice community. When 1999 arrests for drunkenness (34,496), driving under the influence (43,355), liquor laws (4,266), and narcotic drugs (28,125), are combined, a total of 110,242, or 44.9 percent, of all arrests (245,403) for Part II Crimes in Kentucky were for drug and alcohol offenses.

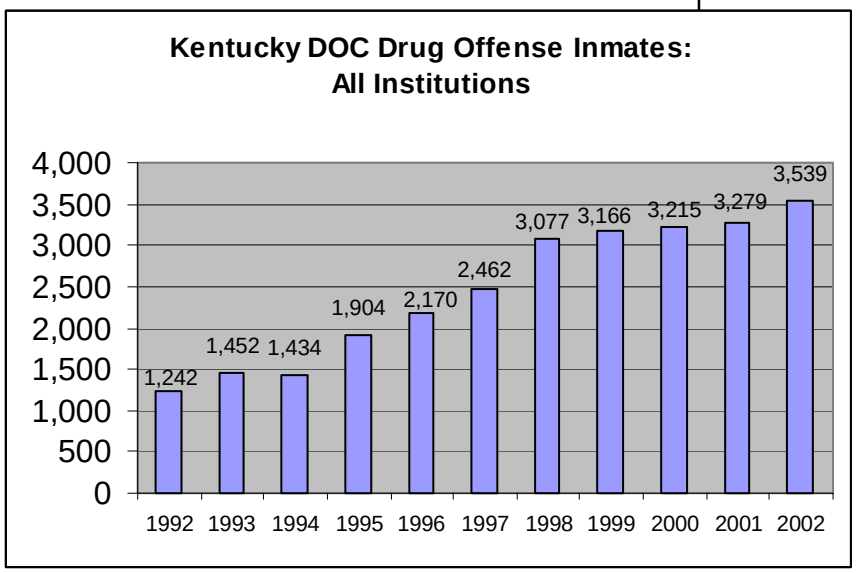
According to the ONDCP's *Profile of Drug Indicators, August 2002*, between January 2000 and June 2001, 69 of Kentucky's 1,000 pharmacies reported OxyContin-related burglaries or robberies. The Kentucky State Medical Examiner's Office identified the presence of oxycodone in 69 deaths, of which the oxycodone levels were toxic in 36 of the deaths. In FY 2001, more than 260 methamphetamine laboratories were seized in Kentucky. In FY 1999, 410 individuals were charged with methamphetamine production, and this number more than doubled to 839 in FY 2000.

The Crisis in Prisons and Jails

The War on Drugs initially emphasized funding on law enforcement without concomitant funding emphasis on treatment and defense of indigents, which has created alarming problems for jails and prisons. When asked why he was proposing significant increases in funding for drug treatment and prevention in his crime bill, former President Clinton stated, "We cannot jail our way out of this problem." However, progress is still needed to fully balance funding to all avenues of attack on the drug problem.

The ONDCP reported in *Drug Related Crime* that from 1990 to 1998, the Federal prison population almost doubled, reaching 123,041 offenders. The State prison population also increased significantly between 1990 and 1998, from 703,393 to 1,178,978 inmates. At year-end 1998, the number of offenders in jails was 592,462, also an increase. This phenomenon has created a funding crisis for federal, state, and local governments.

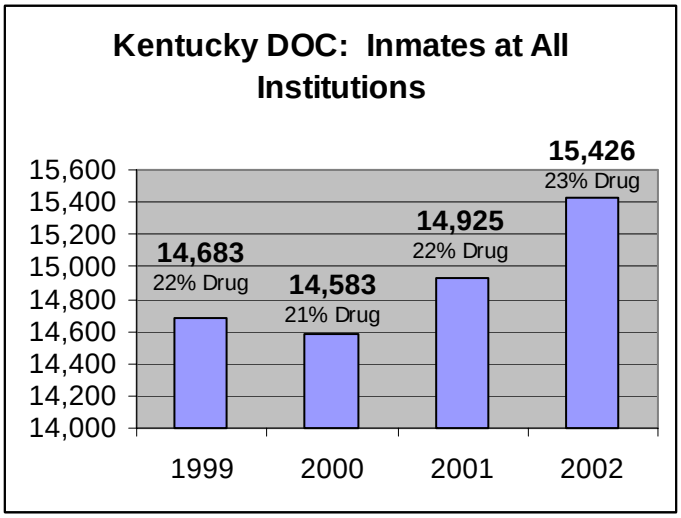
For Kentucky, the Department of Corrections annual *Profile of Inmate Population* reports show that Kentucky's prison population has increased 5% in the last four years, rising from 14,683 in 1999 to 15,426 residents in 2002 (see Graph 2). The Department of Corrections data further indicate that the number of drug offenders committed to Kentucky's prisons has increased 11.8% from 3,166 to 3,539 over the same four year period, but has nearly tripled from 1992 to 2002 (see Graph 1 and 2). The 3,539 residents incarcerated for drug offenses in 2002 make up 23 percent of Kentucky's total prison population.



Drug Treatment

The report on *Drug Treatment in the Criminal Justice System* by the ONDCP stated that in 1998, drug offenders comprised 59% of federal inmates, 21% of state inmates, and 26% of jail inmates. By comparison, in 1980, 25% of federal inmates and 6% of state inmates had been drug offenders. It is estimated that 60% to 83% of the Nation's correctional population have used drugs at some point in their lives, up to twice the estimated drug use of the total U.S. population (40%). The National Center on Addiction and Substance Abuse estimates that of the $38 billion spent on corrections in 1996, more than $30 billion was spent incarcerating individuals who had involvement with drug and/or alcohol abuse, either in their personal history, conviction, use at time of the crime, or committing their crime to get money for drugs. The average cost per year to incarcerate an inmate in the United States in 1997 was $20,674, the Federal average cost is $23,542, and the State average is $20,261. Annual costs among local jails vary widely, from $8,037 to $66,795. For drug treatment, the average cost per treatment episode was $2,941 between 1993 and 1995. The average treatment benefit to society was $9,177 per client. This resulted in an average savings of three to one: every $1 spent on treatment saved society $3. The savings resulted from reduced crime-related costs, increased earnings, and reduced health care costs that would otherwise be borne by society.

According to the BJS in *Drug Use, Testing, and Treatment in Jails*, in 1998 an estimated 7 in 10 local jail inmates had used drugs regularly or had committed a drug offense. An estimated 61,000 (16%) convicted jail inmates committed their offense to get money for drugs. Two-thirds of convicted jail inmates were actively involved with drugs prior to their admission to jail. The BJS *Census of Jails, 1999* showed that in 1999, 54% of jail jurisdictions had a drug counseling program. In Kentucky, 40 jail jurisdictions had drug counseling at that time (out of the national total of 1,529 jail jurisdictions with such programs).



Problems Associated with Multiple Defendant Drug Cases

The increase in arrests for drug offenses in Kentucky to over 28,000 in 1999 has placed a severe strain on the resources of the public defender system. This is especially true in multiple defendant drug cases resulting from drug sweeps by the police in numerous counties. Department of Corrections drug offender inmates number 3,539, compared to 1,242 a decade earlier, which gives a further indication of the swelling ranks of these cases.

Kentucky State Police officials have in the past indicated that they conduct as many as twelve drug sweeps per year. The number of people arrested in any given sweep depends upon the size and population of the jurisdiction in which the sweep is made. The number of arrestees usually ranges between 12 and 50. In one statewide drug sweep several years ago the Kentucky State Police arrested 687 people.

Case law has clearly established that in a situation in which there are multiple defendants, one attorney cannot represent more than one client where there is a conflict of interest. In some situations, the attorney who makes the initial contact with multiple defendants in a multiple defendant case may not be able to represent any of them due to multiple conflicts.

The DPA provides constitutionally mandated criminal defense services throughout the Commonwealth. In these counties where drug sweeps occur, an inordinate amount of defender resources are used in multiple defendant drug cases. When dealing with multiple defendants, locating conflict attorneys using existing resources is a problem that results in considerable delay in processing these cases in court.

Endnotes:

1. This article is an update of an article by William P. Curtis, found in the January 1996 issue of *The Advocate*, Vol. 18, No. 1, Page 3. Much of the above article's structure and language was adapted or updated from the Curtis article.

2. Crime in Kentucky reports for 1998 and 1999 warn against comparing data for these years to any data from years prior to 1998 due to changes in internal counting methods. The reports for 2000 and beyond were not available as of this writing. ■

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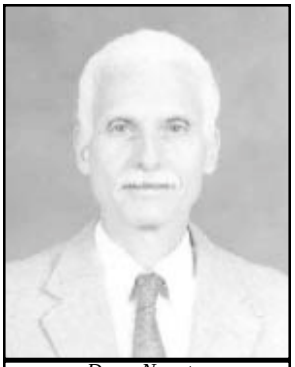
Tying Up to the Drug Research Anchors for a Successful Alternative Intervention



Dave Norat

With the US justice system awash with probationers and state prisoners reporting drug or alcohol abuse and specifically with illegal drug use common among Kentucky prisoners, Kentucky's defenders need to take heed of the storm warnings that Dr. Carl Leukefeld and his crew have hoisted and tie up to the anchors he has tossed into the waters. With 23% of Kentucky's correctional population incarcerated on alcohol or drug offenses these anchors will benefit our clients as we inform the court of the value of an alternative that changes criminal behavior versus the client's incarceration and continued behavior.

The first anchor: referrals for drug and alcohol treatment is not unique and is acceptable in the criminal justice system - 64% of the referrals for treatment in Kentucky for year 2000 were involved in the criminal justice system.

The second anchor: treatment has had success - specialized treatment programs can be effective in reducing abuse and preventing relapses.

The third anchor: employment - even with limited information employment is considered an important part of treatment.

The fourth anchor: coerced treatment can be effective - studies indicate that there is a positive relationship between coerced treatment and favorable outcomes.

While there may be disagreement in the drug treatment community over whether or not the goals of community treatment and criminal justice sentencing are compatible, review of the goals usually considered by judges at sentencing (community safety, treatment, restitution and punishment) and Kentucky's presumption for probation (KRS 533.010 (2)) guides me through this storm to say they are compatible.

- Community Safety – Treatment: ; Community drug treatment is an accepted treatment. Drug treatment also provides structure and supports which are factors in reducing the likelihood of further criminal justice activity.
- Treatment – Drug Treatment: Dug treatment which is specialized to the offender's needs produces positive results in recovery and in preventing relapse. Clients who are in treatment longer have even more favorable recovery outcomes.
- Restitution – Employment: Many property crimes can be tied to drug abuse, additionally there is a cost involved when providing drug treatment. With employment considered an important part of treatment, the victims (whether an individual or the community) of drug related crimes have an opportunity to be made whole through the employment of the drug abuser.
- Punishment – Coerced Treatment: One of the stated purposes of punishment is to change behavior. Also, what may be punishment for one individual is not for another. In studies cited by Dr. Leukefeld, coerced treatment (punishment) for offenders does bring about favorable results.

Having tied the sentencing goals to the anchors above, any disagreement with compatibility between drug treatment and an alternative to the criminal justice system should clear. Defenders should now begin drying out the criminal justice system from the flood of drug abusers. Drying out the system by using Dr. Leukefeld's anchors as the argument for why clients charged with a drug offense or drug related offense should be released or sentenced to a drug abuse treatment plan. ■

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When you get to the end of your rope, tie a knot and hang on.

-Franklin D. Roosevelt

Constructive Possession of Drugs: A Caselaw Review

Linda Horsman

Traditionally, in order to be determined to have possession of drugs, and therefore be criminally liable, the Commonwealth was forced to prove "actual" possession, *i.e*. the drugs were actually found on the person. However, "constructive" possession allows for inferences to be made when the drugs aren't found on a person, but nearby a person. And it appears that the requirements to prove constructive possession get looser with each opinion.

Rupard v. Commonwealth, Ky., 475 S.W.2d 473 (1971), involved an abandoned house in Clark County that might have been the site of drug trafficking. Upon entering the house, the police found that there was marijuana drying on the floor of two rooms in the house, and also found a set of postal scales. The officers left the home, but kept it under surveillance. The police observed Rupard and co-defendant Sierp approach the house and go upon its side porch, but the police were unable to see from their vantage point whether or not the two men entered the home. When the men came back to their car parked nearby, the police arrested them and noted a plastic bag containing marijuana in plain view on the dashboard. The police took the two men back to the abandoned house and noted that since the police had been in the home earlier, several items had been moved. The police had observed no one else approach the home other than Rupard and Sierp during their surveillance. The Court found that there was sufficient evidence to support a "rational inference" that the appellants had constructive possession of the marijuana found in the abandoned house. It is interesting to note that the owner of the abandoned home was never a suspect and never charged, though surely the home was subject to his dominion and control.

Next came *Leavell v. Commonwealth*, Ky., 737 S.W.2d 695 (1987). Mr. Leavell was apparently not dressed nattily enough for a security guard, coincidentally an off-duty police officer, at the Lexington Hilton, which caused the guard to become suspicious enough of Mr. Leavell and his cohort that he followed them to their hotel room and listened outside the door. Upon hearing them discussing money and drugs, he called in an on-duty policeman. Mr. Leavell was stopped later as he was leaving the hotel and on his person was found a small portion of marijuana in his pocket and an automobile key in his hand. He also had a briefcase on him in which was found another car key. After effecting a search pursuant to a warrant, the police found another key to the trunk of a car. Ninety pounds of marijuana was found in the trunk of that car which was in the parking lot. The Supreme Court reasoned that because Mr. Leavell had the ignition key in his hand to the car in which the marijuana was found, he was in constructive possession of the automobile and therefore the pot. "Dominion and control" over the car is the key—whoever has such dominion or control is deemed to be in constructive possession of the contents of the car. There is no requirement upon the state to prove actual knowledge under *Leavell* as it is presumed that one who has dominion or control over the auto knows what is in it—it is this failure to require the state to prove knowledge that often results in a conviction. Knowledge can be inferred, or even supplied by the testimony of a co-defendant, as it was in this case.

In *Hargrave v. Commonwealth*, Ky., 724 S.W.2d 202 (1987), the Court quoted *Rupard* and stated that "possession need not be actual; 'a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion and control." *Rupard* at 475. In *Hargrave*, it was inconsequential to the Court that the confidential informant did not see Mr. Hargrave handling the drugs; the simple fact that the drugs were found on his premises was sufficient to convict him under the constructive possession theory.

In *Clay v. Commonwealth*, Ky. App., 867 S.W.2d 200 (1993), review denied (1994), the resident of the home where drugs was found was convicted, despite the fact that the prosecution was never able to connect her in any other way to the drugs. Ms. Clay argued that the Commonwealth failed to connect her personally to the cocaine found in her kitchen and bathroom or the marijuana found in her bedroom. The presence of the drugs in her home was enough.

In *Paul v. Commonwealth*, Ky., 765 S.W.2d 24, 26 (1989), the Court of Appeals found that mere presence in an automobile in which contraband is found is not sufficient to support a charge of possession against a mere passenger and that "the person who owns or exercises control over a motor vehicle is deemed to be the possessor of any contraband discovered inside it." In so finding, the Court stated, "[f]urthermore, a person's mere presence in the same car with a criminal offender does not authorize an inference of participation in a conspiracy. See also, *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948). The probable cause requirement is not satisfied by one's mere propinquity to others independently suspected of criminal activity. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed. 2d 238 (1979)." Id.

The Supreme Court of Kentucky recently cited *Paul*, determining that a person in the backseat of a car can be deemed to be the possessor of contraband found inside the car.

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Burnett v. Commonwealth, Ky., 31 S.W.3d 878 (2000). *Burnett*, however, contains several important facts which made the inference more tolerable. Chauncey Burnett was in the process of hiding from the police in a public housing project in Louisville known for a high amount of drug trafficking activity. Officers noticed Burnett hide behind and then duck into the backseat of a car. The car, driven by his sister, drove away and was followed by police. When Burnett exited the car to use a pay phone, the police moved in. After obtaining permission to search, they located crack cocaine in the back seat in a bag which the sister stated belonged to Burnett. The Supreme Court, however, noted the paucity of the evidence in *Burnett*, stating, "[w]hile not overwhelming, the evidence (sister's testimony) was sufficient to create an issue of fact for the jury." *Id.* at 881.

Constructive possession cases are difficult as they are so factually driven, as seen from the case abstracts above. Attention to the particular facts and the creation of reasonable doubt in the minds of the jurors is of utmost importance, as the apparent willingness of the Appellate Courts to confirm these convictions is clear.

Knock and Announce: Police Must Announce Presence at Door and Wait Reasonable Time from Announcement Before Forcing Entry

In *Gay v. Commonwealth*, 2002-CA-000532-MR, rendered March 8, 2002, not to be published, the Kentucky Court of Appeals made it clear that, in serving a search warrant, police must announce their presence at the door of a domicile before breaking down the door, regardless of the fact that evidence may be lost as a result of the announce.

Gay concerned the actions of the Jefferson County Metro Narcotics Unit, which assumedly should be among the most prepared and well-trained law enforcement entities. However, from the testimony of one of that unit's detectives at the suppression hearing held in Jefferson Circuit Court, it appears that that assumption is incorrect. Det. Steve Farmer was excruciatingly honest in his testimony—he clearly testified that when the unit arrived at Mr. Gay's residence, he knocked on the door, but did not announce that the visitors were police. This is known as a "silent knock." After the silent knock, Farmer testified the police waited twenty to thirty seconds before knocking again, with an announcement this time, to wit, "Police, Search Warrant." These actions are squarely in line with present search and seizure law. However, the time between this second knock and announce and the eventual breaching of the door was a scant "few seconds," according to Farmer's testimony. Because the police did not allow Gay, or anyone else present in the home, adequate time to answer the door after the announcement, the Court found that Gay's rights under the Fourth Amendment were violated and suppressed all evidence seized as a result of the police's illegal entry.

Citing *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), the Court of Appeals found that a reasonableness standard is imposed upon the police's conduct in executing a search warrant when no exigent circumstances are evident. This reasonableness standard requires that the police announce their presence and then wait a "reasonable" amount of time before forcing entry into a residence, reasoning that it is "the announcement, and not the knock, that triggers the amount of time for making a reasonableness determination." To support this contention, the Court cited *United States v. Spikes*, 158 F.3d 913 (6th Cir. 1998), where the 6th Circuit stated, "[t]he proper trigger point, therefore, is when those inside should have been alerted that the police wanted entry to execute a warrant" and found that the knock is superfluous and has no impact upon the reasonableness standard. *See also United States v. McCloud*, 127 F.3d 1284, 1288 (10th Cir. 1997).

The Court of Appeals then found, that based upon Det. Farmer's testimony that only a "few seconds" elapsed between the time he announced the presence of the police for the purpose of executing a search warrant and the time of the breach of the door, that the actions of the Metro Narcotics Unit did not pass muster under the "reasonableness standard" articulated in *Wilson*.

The Court did go on in dicta to state that exigent circumstances, where it might be dangerous to the health and safety of police or private citizens to announce police presence or where evidence might be destroyed because of the announcement, might abrogate one's rights under the Fourth Amendment. *See generally*, *Adcock v. Commonwealth*, Ky., 967 S.W.2d 6, 8 (1998); *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S.Ct. 1416, 1421, 137 L.Ed.2d 615 (1997). The burden is on the state to show that law enforcement had grounds to believe that exigent circumstances existed in any given case and such determinations as to whether exigent circumstances exist shall be determined on a case-by-case basis, with no assumptions made that because narcotics might be involved their destruction is *per se* imminent. In *Gay*, the Commonwealth failed to even attempt to articulate the existence of any exigent circumstances. The Court then stated that, when no showing of exigent circumstances has been made, delays between an announcement and breach of five seconds or less are unreasonable. *See United States v. Jones*, 133 F.3d 358, 361 (5th Cir. 1998).

How to Affix a Tax Stamp to Your Pot Plant

On August 1, 1994, a strange statute became the law of the land in the Commonwealth of Kentucky—the controlled substances excise tax, KRS 138.870 to 138.990. This piece of legislation calls on citizens who are in possession of more than a threshold amount[1] of marijuana or controlled substances to present themselves at the Revenue Cabinet, anonymously, and purchase tax stamps that are, by statute, to be affixed to their marijuana or other unlawful substance. KRS 138.874(2). The payment of such tax provides the citizen with a tax stamp good for one year. KRS 138.874(3).

The first thought most have upon confronting this statute is that it smacks of double jeopardy. However, the Kentucky Supreme Court did not so find in the only published decision concerning the Controlled Substances Excise Tax, *Commonwealth v. Bird*, Ky., 979 S.W.2d 915 (1998), *cert. denied*, 526 U.S. 1145, 119 S.Ct. 2019, 143 L.Ed.2d 1031 (1999). In *Bird*, the Appellant argued that his payment of the tax barred subsequent prosecution on federal and Kentucky law grounds. The Supreme Court disagreed and cited *Department of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). *Kurth Ranch* held that the Montana tax did act as a bar to subsequent prosecution on double jeopardy grounds because it "intertwined with the state's traditional criminal laws" as (1) the tax was payable only after arrest for a drug crime, (2) the tax return was completed by law enforcement authorities and (3) the drugs were confiscated and destroyed. *Bird* at 916, quoting 1995 Op. Ky. Att'y. Gen. 13. Our Supreme Court reasoned that as the Kentucky tax applies only to "conduct not previously punished as a crime," to wit, the failure to anonymously purchase and affix a tax stamp to marijuana and controlled substances upon possession of such, rather than the already-punished conduct of possession or trafficking, it passed constitutional muster.

Bird is the only published case concerning this Excise Tax, and the facts of this case raise more questions than do they provide answers. Apparently Mr. Bird and his cohort, Mr. Nicholson, were successful enough "businessmen" that they paid the tax prior to even being indicted for charges of drug trafficking, after the Lexington Urban-County Police Department busted their operation. The total tax paid by the two amounted to $10,000; $6,000 was paid by Bird, $4,000 by Nicholson.

How did the Revenue Cabinet know to levy the tax against Mr. Bird and Mr. Nicholson? The Supreme Court states in its opinion that, noting no tax stamps on the cocaine, the *police* filed a notice of seizure with the Revenue Cabinet pursuant to KRS 138.880. Eerily, 138.880 states that the *Commonwealth's attorney* or the *county attorney* shall, upon conviction of, or a guilty or Alford plea from, an offender violating KRS Chapter 218A, notify the Revenue Cabinet. Notice the difference here: Bird and Nicholson were referred by *cops* after only a *charge* under KRS 218A whilst the statute, ostensibly attempting to uphold the constitutional guarantee of the presumption of innocence, requires the *prosecuting attorney* to notify Revenue only after obtaining a *conviction* or *guilty plea*. Apparently, the Supreme Court did not find controlling the fact that Bird and Nicholson were taxed after only a charge and not after conviction.

Further, how did the Revenue Cabinet know how much to charge each man, rather, how did they know how much coke each possessed? They apparently took the word of the police.

Suppose you are representing a client charged with possession of cocaine. He was riding in a car with two other people. He was sitting in the back seat. The two others were driving and in the front passenger seat. Your client is African-American. The other two folks are white. They get pulled over. The driver consents to a search. The police find 60 grams of cocaine in the front seat and 20 grams in the back seat. The police charge each person with possession of 80 grams of cocaine. Revenue taxes your client. Based upon KRS 138.872, the tax rate is $200 per gram, or in the case of 80 grams of cocaine, $16,000. Your first question to the Revenue Cabinet is whether or not the other two folks, who were similarly charged by the police with possession, were taxed also. The response from Revenue is "that is none of your business and is confidential." So, you may assume that either 1) Revenue is triple-dipping, or 2) the police only referred your client to Revenue for taxation, and not the two others—for reasons open to speculation. Horrifying implications ensue.

Additionally, the tax does not discriminate based upon the quality of drugs—adulterated, unadulterated, one megaparticle of cocaine per thousand ounces of baby powder—under KRS 138.872(2), it doesn't matter a whit.

What happens if your client doesn't purchase the stamps in advance and gets reported to revenue? The penalty is 100% of the tax. KRS 138.889(1). Plus, they are guilty of a crime additional to that of possession or trafficking as failure to affix the appropriate tax stamp to the controlled substance or marijuana causes one to be guilty of a Class C felony, with a penalty range of five to ten years in the penitentiary. KRS 138.889(2)(a), KRS 532.060.

As for how exactly you get the tax stamp to stick to a to a marijuana plant—it remains a mystery. Per KRS 138.876, Revenue was to promulgate regulations for the administration of KRS 138.870 to 138.889, but as of this date, none have been promulgated.

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Endnote:

1. KRS 138.870 (4). This threshold amount depends on the type of drug involved. For growing marijuana plants, the requirement attaches upon possession of the sixth plant. For harvested marijuana, the threshold is any amount over 42.5 grams, while any other controlled substance sold by weight has a lower threshold of anything over 7 grams. Pills or any other drug tallied in "dosage units" has a threshold of 50 units. ■

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ASK CORRECTIONS

QUESTION: My client recently received a five year sentence for trafficking 2nd degree. He has a history of drug use. Does the Parole Board require that he attend a drug treatment program before meeting the Parole Board?

ANSWER: No. There is no requirement that a person must receive drug treatment before becoming eligible for parole consideration. However, the Board may recommend that he receive treatment prior to being paroled.

QUESTION: My client was convicted of possession of contraband 2nd degree due to drugs being found in his possession while incarcerated in the state penal system. He received a ninety (90) day misdemeanor sentence. The trial court ordered that this sentence run consecutively to the felony sentence he was serving. Is there a statutory provision which allows the court to run a misdemeanor sentence consecutively to his felony sentence?

ANSWER: Yes. Under KRS 532.110 (4) and (5), if a person is convicted of an offense that is committed while he is imprisoned in a penal institution during an escape from imprisonment, or while he awaits imprisonment, the sentence imposed for that offense may be added to his sentence. The trial court may order that sentence for a crime committed in the institution be served in that institution.

QUESTION: My client was placed in a drug treatment program while on parole. This drug treatment program was an alternative to parole violation charges being pursued. If he completes the program and his parole is later revoked will he receive credit against his sentence for that time?

ANSWER: No. KRS 439.344 provides that the period of time spent on parole shall not count toward his sentence. The Department of Corrections does credit individuals with the period of time spent in jail on parole violation charges, known as P.V. time credit. His placement in the drug treatment program was a condition of his parole and was not time spent in jail on violation charges. Therefore, he would not receive that time as credit against his sentence.

QUESTION: My client was convicted of possession of a controlled substance 2nd degree, a Class D Felony. At the time of the offense, he had in his possession a firearm. What, if any, additional punishment may he receive as a result of the firearm possession?

ANSWER: Under KRS 218A.992 the penalty imposed may be raised to the next highest felony class. Therefore, he may be sentenced under the sentencing guidelines for a Class C Felony. However, this would be determined by the sentencing court.■

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Possession of Methamphetamine Precursors: Prosecuting Phantom Crime

Robert Stephens

The New Law

HB 644 was signed into law (Acts Chapter 170) on April 2, 2002 by Governor Patton. (For legislative history of the act, see http://www.lrc.state.ky. us/record/02rs/HB644.htm). This new law, making it a crime to possess or distribute a methamphetamine precursor, opens a massive door for potential abuse and unequal enforcement of the law. HB 644 makes it illegal to possess a precursor to creating methamphetamine, and represents a radical departure from past experience in prosecuting the alleged manufacture of illegal substances. Possession of otherwise legal product has now been made criminal, based solely on a governmental allegation regarding the possessor's intent. Enforcement of this law can only be haphazard and unequal, with some groups of persons facing indictment for its violation, while others are never charged. To charge possession of methamphetamine precursors is to prosecute phantom crimes; it is to criminalize behavior that cannot have matured into truly criminal activity; it is to chase the thoughts and intentions of defendants, to shift the government's evidentiary burden and force defendants to prove their innocence.

The text of the new law is:

CHAPTER 170
(HB 644)

AN ACT relating to crimes and punishments.
Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 218A IS CREATED TO READ AS FOLLOWS:

(1) A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

(2) (a) Except as provided in paragraph (b) of this subsection, possession of a drug product or combination of drug products containing more than twenty-four (24)[1] grams of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, shall constitute prima facie evidence of the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

(b) The prima facie evidence referred to in paragraph (a) of this subsection shall not apply to the following persons who lawfully possess a drug product or combination of drug products listed in subsection (1) of this section in the course of legitimate business:

1. A retail distributor of drug products or wholesaler of drug products or its agent;
2. A wholesale drug distributor, or its agent, issued a permit by the Board of Pharmacy;
3. A pharmacist licensed by the Board of Pharmacy;
4. A pharmacy permitted by the Board of Pharmacy;
5. A licensed health care professional possessing the drug products in the course of carrying out his or her profession;
6. A trained chemist working in a properly equipped research laboratory in an education, government, or corporate setting; or
7. A common carrier under contract with any of the persons or entities set out in subparagraph 1. to 6. of this paragraph.

(3) Unlawful possession of a methamphetamine precursor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

SECTION 2. A NEW SECTION OF KRS CHAPTER 218A IS CREATED TO READ AS FOLLOWS:

(1) A person is guilty of unlawful distribution of a methamphetamine precursor when he or she knowingly and unlawfully sells, transfers, distributes, dispenses, or possesses with the intent to sell, transfer, distribute, or dispense any drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or any of their salts, isomers, or salts of isomers, if the person knows that the purchaser intends that the drug product or combination of drug products will be used as a precursor to methamphetamine or other controlled substance, or if the person sells, transfers, distributes, or dispenses the drug product or combination of drug products with reckless disregard as to how the drug product or combination of drug products will be used.

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(2) Unlawful distribution of a methamphetamine precursor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

A New Course in the Prosecution of Illicit Drug Production

House Bill 644 takes an unusual step in the prosecution of alleged illicit drug production. Unlike KRS 218A.1415, which prohibits the possession of methamphetamine, and KRS 218A.1432, which prohibits the manufacture of methamphetamine, HB 644 makes it a felony offense to possess otherwise legal, legitimate products. Products containing pseudoephedrine, an oral decongestant, are sold by the thousands over-the-counter every day to persons treating allergy and cold symptoms. Ephedrine was used for years in weight loss pills, and has apparently been replaced on the market by one of its own precursors, ephedra. Phenylpropanolamine has been pulled from the market, but was used in the past in an over-the-counter diet pill. There is nothing *per se* illegal about the possession of pseudoephedrine, ephedrine, or phenylpropanolamine. Practically everyone reading this article probably has some product in his or her medicine cabinet containing pseudoephedrine.

Unlike the crime of methamphetamine production, which requires some steps toward methamphetamine manufacture to have been taken (such as beginning the manufacturing process, or possessing the chemicals[2] or equipment for the manufacture of methamphetamine), HB 644 makes the mere possession of ephedrine, pseudoephedrine, or phenylpropanolamine a crime. No tangible step, no action, need be taken to violate the provisions of HB 644; otherwise, the crime charged would be methamphetamine production.

The legislature, of course, has made possession of a methamphetamine precursor illegal only if the possessor has the intention of using it to produce methamphetamine. The critical issue is the possessor's intent. How, then, is this intent to be shown? Detection of the alleged crime and proving the requisite intent are bound up together in the case of this new law. Detection must rely upon the initiative and credibility of informants. If any other method of detection could suffice, some step would need to have been taken, which would bump the activity from possession of a methamphetamine precursor to methamphetamine production.[3] One may reflect on the degree to which prosecution of methamphetamine production utilizes informant activity. Likewise, what evidence, other than the likely biased testimony of a drug informant, could be used to establish intent for this criminal possession? A confession could be used to prove the possessor's intent, but again detection of the crime even in this instance would realistically depend upon an informant's "assistance."

Retail stores selling materials containing methamphetamine precursors are exempted from the greater than 24 grams prima facie presumption, as are common carriers that transport the products for the retailers. By excluding retailers from the greater than 24 grams presumption, the legislature has made our point about proving intent. By removing the over 24 grams presumption, the legislature has essentially precluded retailers from prosecution, for without the presumption, how could intent to produce methamphetamine be shown against a nationwide retail store? After all, no prosecutor would believe, much less place on the witness stand, an informant who tried to say a retail store intended to produce methamphetamine. What other, non-informant, evidence could be used to show intent by a retail store to produce methamphetamine? There is none, just as there is no evidence, other than the words of a drug informant, which could be used to establish intent against any defendant. Pharmacists and the like are understandably also effectively exempted from prosecution. Clearly, the legislature has foreseen the necessity of precluding prosecution of certain parties possessing the products for legitimate purposes: for the transport, sale, and legal distribution of these quasi-medicinal products.

But, what of the consumer? Products containing ephedrine, pseudoephedrine, and phenylpropanolamine are not illegal to possess, *per se*. They are not truly controlled substances requiring a prescription for legal possession. What protection does the consumer, possessing perfectly legal allergy medication, have against prosecution? Will he or she have to talk to police, even testify at trial to establish his or her possession was for a legitimate purpose?

One could be arrested for possession of a methamphetamine precursor while leaving the checkout counter at Wal-Mart. The law created by HB 644 is analogous to punishing the possession of rifle shells with the intent to poach deer out of season. In this hypothetical, possession of any number of rifle shells plus "intent" would be enough to prosecute someone for possession of a deer poaching precursor, with possession of over 50 shells acting as prima facie evidence of intent to poach. The law stretches the punishment of criminal "activity" far beyond the bounds of what can be dependably proven in court.

At least with the greater than 24 grams prima facie instruction, some standard is applied to, in some way, show intent, even if it is done through the use of a legal presumption. For persons possessing less than 24 grams, however, there is no standard to guide law enforcement regarding whom to prosecute, juries regarding whom to convict. There is no protection from charging, and absent some proof that they did not possess ephedrine, pseudoephedrine, or phenylpropanolamine with the intent to produce methamphetamine, no way to refute the government's allegation. As a matter of policy, the legislature should either make ephedrine, pseudoephedrine, and phenylpropanolamine controlled substances, and their non-prescribed possession a crime, or not; the attempted partial criminalization merely provides an avenue for partial enforcement and abuse. This is especially true for pseudoephedrine, which is still widely marketed.

A law such as that created through HB 644 can at best result in uncertain, haphazard application; at worst it can lead to equal protection violations as some groups of people are charged for possession of the same legal product possessed by other groups of uncharged persons. The prosecutor's grandmother who keeps over-the-counter pseudoephedrine tablets in her medicine cabinet probably never will have to fear the repercussions of HB 644, even if she possesses a hoard of the stuff which amounts to over 24 grams. The young man, who runs afoul of an informant in desperate need of governmental absolution, could suddenly find himself charged with a felony for keeping the same perfectly legal decongestant.

Unlawful Distribution, A Reckless Chain of Criminal "Activity"

A final note on section 2 of the new law, dealing with unlawful distribution of a methamphetamine precursor. The points noted elsewhere in this article regarding possession of a methamphetamine precursor apply equally to unlawful distribution of the same, but the distribution section raises some distinctive issues. One can be found guilty of unlawfully distributing a methamphetamine precursor if one distributes the product knowing the receiver intends to use it to produce methamphetamine, or if one distributes it with *reckless disregard* as to how it will be used.

Will the proverbial Aunt Sally, who gives her nephew or niece a box of allergy pills, be charged with a felony when the recipient takes the drug and attempts to make methamphetamine? The text of the new law provides for this result. Will the recipient even first have to attempt to make methamphetamine, or is the drug recipient's naked possession of the precursor plus "intent" enough to convict the person who gave them the drug under section 2? The wording of the statute would seem to suggest this is enough!

How far can this chain of distribution and reckless disregard extend? The statute declares no limit when it reads, "with reckless disregard as to how the drug product…will be used," for it does not say to whom the verb "used" applies, the direct recipient or someone further down the chain of distribution. Indeed, can a commercial retailer of products containing pseudoephedrine be guilty of unlawfully distributing a methamphetamine precursor unless it takes some sort of effective precautions to ensure its customers, or those obtaining product from customers, do not intend to use the product to produce methamphetamine? The primary current precaution, precluding sale of more than so-many boxes of products containing pseudoephedrine, surely is not enough alone to pass the reckless disregard standard.

The room for abuse under section 2 is thus even greater than for mere possession of a methamphetamine precursor. Before Aunt Sally, a retailer, or even a health care worker can give someone a single antihistamine tablet, what procedures must be taken to ensure they have not acted in reckless disregard?

A Bold Step in the Wrong Direction

Creation of the crime of possession of a methamphetamine precursor is a bold step in the prosecution of illegal drug production. Boldness, however, does not always truck with wisdom, and HB 644 is a great leap backward in the equitable pursuit of justice. The law created from HB 644 has no standards to control its use, no guidelines for when it should be enforced. HB 644 can at best be enforced haphazardly and effectively shifts the burden of proof onto the accused to establish his or her innocence. HB 644 asks law enforcement in Kentucky to pursue charges, not against those making tangible violations of identifiable law, but against persons "committing" phantom crimes.

Endnotes

1. For some idea of how much weight we are talking about, a brand new No. 2 pencil and a nickel each weigh approximately five (5) grams.
2. More than one chemical is thus required (absent the equipment) to prove methamphetamine manufacture, but only one of three specified chemicals (ephedrine, pseudoephedrine, or phenylpropanolamine) must be possessed to be guilty of possession of a methamphetamine precursor.
3. There is a legitimate question whether possession of a methamphetamine precursor could be charged along with methamphetamine manufacture, or whether double jeopardy would preclude such action. At least section 2, dealing with distribution of a methamphetamine precursor, appears to meet the requirements of modern double jeopardy law (*See Blockburger v. United States*, 284 U.S. 299 (1932), and *Commonwealth v. Burge*, Ky., 947 S.W. 2d 805 (1997)), in which all that is required to pass the double jeopardy restriction is some element not required in the prior charged offense. In this case, the extra element would be unlawfully distributing the chemical precursor. It would be an unusual fact situation, however, in which a person could be charged with manufacturing methamphetamine and distribution of a methamphetamine precursor. Since ephedrine, pseudoephedrine, and phenylpropanolamine are all chemicals that can be used in the production of methamphetamine, possession of a methamphetamine precursor would seem to be a lesser-included offense within KRS 218A.1432. ■

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DISTRICT COURT COLUMN

Instant Prelims: Firearms Enhancement in a Drug Case

B. Scott West

From time to time, the District Court Column will feature "Instant Prelims," a short checklist designed to help prepare a cross-examination on one or more issues that frequently occur in preliminary hearing. Recognizing that defense attorneys often have a week or less between the arraignment and the preliminary hearing, "Instant Prelims" is designed to give a succinct statement of the law on the issue and a few tips on where and how to quickly get a witness or evidence on a low-budget or no-budget basis. The information or ideas in these short pieces will seldom be new to anyone who does a lot of preliminary hearings. However, these tightly packaged checklists may come in handy for those with little time to brush up on the law. Whether the goal is to get a dismissal, get an amendment to a lesser charge, or commit the Commonwealth to a version of facts early in the case, it is hoped that "Instant Prelims" will be useful. If anyone out there has an idea and would like to submit for publication an "Instant Prelim" of his or her own, please contact Jeff Sherr, District Court Column Editor, at ***The Advocate****.*

This article deals with one issue that may arise in a preliminary hearing – the enhancement of an offense under the Controlled Substances Code (Chapter 218A) due to the possession of a firearm by the offender. See 218A.992. In the experience of this attorney, too many drug code offenses are enhanced by the "possession" of a firearm when in fact one has to strain to find an actual or constructive possession of a firearm.

I. Firearms Enhancement Generally

Would-be robbers, burglars, drug traffickers and other potential felons be forewarned: Leave the guns at home. Kentucky lawmakers over the years have shown that they are serious about protecting its citizenry from being shot and have passed various statutes which enhance the penalties for several offenses when committed while in possession of a firearm, while making other felonies not eligible for probation.

Kentucky's version of the Model Penal Code (KRS Chapter 500-534) has long made the penalties for some crimes more serious when a deadly weapon is involved. A firearm is *per se* a deadly weapon as a matter of law, and no jury may find otherwise. *Little v. Commonwealth*, Ky., 550 S.W.2d 492 (1977); *Hicks v. Commonwealth*, Ky., 550 S.W.2d 480 (1977). Robberies and burglaries which ordinarily would be D or C felonies are enhanced to B felonies when the offender is armed with a deadly weapon. This is true whether the person is armed in classic Jesse James style, with a gun in hand, or whether the person is merely carrying the gun as part of the inventory of stolen goods in a pillow case. *Jackson v. Commonwealth*, Ky., 670 S.W.2d 828 (1984), *cert. den.* 469 U.S. 1111 (1985). Nor does it matter whether the gun is unloaded or incapable of firing, *Kennedy v. Commonwealth*, Ky., 544 S.W.2d 219 (1976). Likewise, the penalty for an assault increases when a firearm (or other deadly weapon) is used.

II. Firearm Enhancement in a Drug Case

In the "Controlled Substances" chapter (218A), a/k/a the "Drug Code," the drafters opted to use the phrase "in possession of a firearm" rather than "armed with a deadly weapon." (Obviously, "firearm" is lesser inclusive than "deadly weapon," but "armed with" and "in possession of" mean the same thing. *Meadows v. Commonwealth*, Ky. App., 551 S.W.2d 253 (1977)). A drug code offense is enhanced whenever the offender is "at the time of the commission of the offense in possession of a firearm." KRS 218A.992. Convicted offenders are "penalized one class more severely than provided in the penalty provision pertaining to that offense if it is a felony," or "penalized as a Class D felon if the offense would otherwise be a misdemeanor."

Whenever the Commonwealth is attempting to enhance the penalty for an offense by charging the use or possession of a firearm, the preliminary hearing is the first opportunity to find out precisely how the firearm(s) were involved. If you are fortunate, you can knock out the enhancement and have the charge amended down; if you are not so fortunate, at least you can advise your client early just how serious his charges will be.

- ❑ **Know the law which requires a "Nexus" between the firearm and the underlying offense**.

In *Commonwealth v. Montaque*, Ky., 23 S.W.3d 629 (2000), the Kentucky Supreme Court interpreted KRS 218A.992 to require the existence of some nexus between the firearm and the underlying offense. While "declining to draw a bright-line rule to conclusively establish whether a nexus between the commission of the offense and the firearm possession

has been established," the court did set down some "general observations."

> First, whenever it is established that a defendant was in actual possession of a firearm when arrested, or that a defendant had constructive possession of a firearm within his or her "immediate control when arrested," then, like under the federal sentencing guidelines, the Commonwealth should not have to prove any connection between the offense and the possession for the sentence enhancement to be applicable. [citations omitted.] **However, the defendant should be allowed to introduce evidence to the contrary which would create an issue of fact on the issue.** [Emphasis added – remind me to mention why this was emphasized later.]
>
> Next, when it cannot be established that the defendant was in actual possession of a firearm or that a firearm was within his or her immediate control upon arrest, the Commonwealth must prove more than mere possession. It must prove some connection between the firearm possession and the crime.

Unless the defendant is found in actual or constructive possession of the firearm, the police must establish some "nexus" between it and the drug offense. An example given by the court in *Montaque* is that if a gun is found in a trunk of a car along with drugs, then there is a fact issue for the jury as to whether the gun has a sufficient nexus to the drugs seized.

❑ **Find out why the guns were seized:**

- Is it a *routine* practice for the police to seize guns whenever found in a home where drugs are also found? Or was there something specific about these guns that caused them to be seized this time, when normally they would not have been?
- If there was a search warrant, was the gun specifically listed in the affidavit and warrant before entering, or were the guns seized as an afterthought once they were spotted?

The answers to these questions matter because a routine seizure of any firearms found, and the automatic listing of them in an affidavit of a search warrant before there is any clue that guns are expected to be found with the drugs, suggest that the police are not making independent decisions about whether the guns are related to the drugs.

❑ **Find out about the gun itself:**

- Where was the gun found? In a closet? In a gun sleeve? Under a pillow? On a gun rack over the fireplace? Inside a vault with drugs? In the same room as the drugs.
- Was it loaded?
- What is the normal or typical use of this type of gun: self-protection, or hunting, or target practice, or what?
- How old is the gun? Is it an antique or a collectable?
- Is there someone else in the house the gun could have belonged to?

Ask these questions now, while the seizure is fresh on the minds of the witness, and before you file a motion to dismiss, or suppress, which will be heard only after you have telegraphed the importance of the answers. If the answers you get are favorable, you may have an opportunity to persuade the County amend down and possibly resolve the case in district court. On the other hand, if the answers you get at the prelim hurt, they were always going to hurt, and it is better to find out now and prepare your client for the worst.

III. Other Firearm Enhancement Issues

After the prelim, if the case is bound to the grand jury and you are going to be the circuit attorney, there are some residual issues of which you need to be aware.

A. Is firearm enhancement a "sentencing factor" or an "element" and who cares?

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt." To apply *Apprendi* to a firearm enhancement case, a crime whose *maximum* penalty is enhanced by a firearm possession would have to be raised in the indictment, and the defendant would therefore be on notice that the crime with which he was charged carried a stiffer penalty. Due process would require no less.

Fourteen years earlier, in *McMillan v. Pennsylvania*, 477 U.S. 89 (1986), the Court found constitutional a statute that increased the *minimum* penalty for a crime, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm.

The question in *Harris v. U.S.*, No. 00-10666, *Criminal Law Reporter, Vol. 71, No. 13, p. 413 (2002)* was whether *McMillan* survived *Apprendi*. The Supreme Court answered in the affirmative. Distinguishing *Apprendi*, the Court held that lower courts had reasonably drawn a line "between facts increasing the defendant's minimum sentence and facts extending the sentence beyond the statutory minimum." The Court held:

> The factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by a jury. The finding in *McMillan* restrained the judge's power, lim-

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> iting his or her choices within the authorized range. It is quite consistent to maintain that the former type of fact must be submitted to the jury while the latter need not be.
>
> Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date.

Why is *Harris* and *Apprendi* important in Kentucky drug cases enhanced by firearms. Because, while the federal statute being interpreted in *Harris* (codified at 18 U.S.C. Sec. 924(c)(1)(A)) provided for an increase in the minimum amount of time to serve, the Kentucky statute *increases the minimum and the maximum* into the next highest class offense. Thus, Kentucky's statute falls within *Apprendi*, not *Harris* and *McMillan.* The firearm enhancement becomes an element, not a sentencing factor, and must be raised and proven before a jury.

Some prosecutors just automatically indict on the higher class offense, and specifically name the firearm enhancement in the indictment. Some prosecutors may indict on the drug offense, but hold the enhancement over the Defendant's head, to be added later in the event a plea is not taken. (This is a common practice with PFO cases, also.) If the prosecutor chooses the latter approach, but forgets or chooses not to file a new indictment adding the enhancement and superseding the old one, be sure to object at trial if an attempt is made to enhance the offense during the penalty phase.

If this happens, be sure to have *Harris* and *Apprendi* handy, because *Montaque* refers to KRS 218A.992 has a "sentence enhancement" provision and does not use the phrase "element" to describe the provision.

> Finally, we briefly address the impact of this case on our holding in Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998), in which…we held that " a drug violation penalty may be enhanced under KRS 218A.992 if the violator has constructive possession of a firearm… The only issue in *Houston* was whether the statute required actual, physical possession of a firearm before **sentence enhancement** was applicable. [Emphasis added.]

Apprendi applies to any attempt to extend the maximum possible sentence, regardless of whether the statute calls it an element or a sentencing factor. *See Harris*, at p. 414.

B. "Use of a Weapon" and Probation Eligibility

KRS 533.060(1) generally makes a person not eligible for probation, shock probation, or conditional discharge when the offense committed is a Class A, B or C felony and the commission of the offense "involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury." (The exception to this rule is when the user of the weapon is found to be or have been a victim of domestic violence, and the person against whom the gun was used is the perpetrator of that violence.)

If your client is not going to be able to get shock probation because he used a firearm, tell him that up front before he has to choose between accepting an offer on a plea of guilty or taking a case to trial.

Also, be aware that KRS 533.060(1) appears to fall within *Harris* and *McMillan*, so that even if your client is not indicted on an enhanced offense, he could still be deprived of probation, shock probation or conditional discharge.

III. Conclusion

Thus ends this brief odyssey on firearms enhancement. The most important issue at a preliminary hearing is nailing the Commonwealth down to a theory on the connection between the firearm and the offense – or better yet, establishing that there is in fact not yet a theory. Once it is determined that a gun was seized, the Court will very likely bind the case over regardless of any argument that the nexus requirement was not met. But at least the State is now committed under oath to a version of facts with which it will have to live at arraignment, at suppression hearing, at trial, on appeal,…. ■

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Confidentiality and Drug Treatment Courts

Drug Treatment Courts provide an excellent opportunity for recovery within the criminal justice system for individuals who have an unwanted addiction or drug lifestyle. Many defense lawyers applaud the structure, focused attention, and resources that are available for eligible clients.

While defenders understand that drug court programs can only work if clients come forward with private information, there is concern about the use and access of this information in legal proceedings. If the information gathered supports treatment, counseling or other social service intervention as the client desires, then there is no problem. However, if the client's decision or actions result in termination from the drug court program, there is a serious question about how information given for recovery purposes may be used in criminal proceedings.

What happens, for instance, when after criminal charges have been reinstated, the prosecutor wants to disprove the client's sincerity for rehabilitation by introducing statements made during treatment sessions that the client never really wanted to be in the program? If the treatment provider learns that the client is a known associate of suspects in a high profile case, can this information be used to compel the client's testimony or indict on further charges? What if, several years after successful completion of a drug program, and expungement of charges, the client commits a serious offense and the prosecutor wants to use damaging evidence from the drug court treatment records to deny bail or show a similar pattern of conduct?

The challenge is to guard against misuse of confidential information gathered in the drug court process when the original charges are re-instituted, there is an investigation into crimes in which the client is a witness or suspect, or criminal charges are brought subsequent to participation in a drug court program.

Any information that either flows directly or is easily available to the prosecution has the potential to be used in investigations or prosecutions. The recent movement in juvenile justice to open records under certain circumstances is a reminder that changes in the rules of confidentiality can create risk for the client where none existed before.

In practice, confidentiality is generally assured for information provided to treatment providers, by virtue of the confidentiality laws that bind them. However, where information is provided in open court or through reports available to all drug court team players, the prosecution necessarily gains more knowledge about the stability or instability of the client, use of drugs, home and employment situations, prior history, and continuing information about sobriety and relapse.

Guidance for the defense lawyers crafting or modifying policy on confidentiality exists in the rules of current drug courts, the canon of ethics, various federal and state laws, and analogous protections in other proceedings.

Current Practice in Drug Courts

The Los Angeles Treatment Court provides what may be the best solution; the requirement that records be sealed. This is consistent with civil commitment policy and addresses the key problem of general access. It is also reassuring to clients. Protecting potentially stigmatizing information from disclosure encourages clients to accept treatment, and ensures that private information will not go beyond the needs of treatment.

"American University and the National Drug Courts Institute (NDCI) have excellent resources concerning specific handbooks and forms that can be used as a guide. Much of this is available through their websites at www.american.edu/justice/drugcourts and www.ndci.org."

The Ethical Code

Ethical codes generally require the lawyer to preserve client confidences, unless release is authorized by express or implicit permission from the client. Ensuring confidentiality and the proper use of information in the drug court context is more easily done when the client makes statements directly to counsel, when counsel is present in open court or informal settings, or when statements are available to counsel through reports from a treatment provider or probation officer. Problems arise when the client reveals sensitive personal and family information or incidents of relapse and drug activity during therapy sessions or other participation within the day-to-day context of the drug court.

In 2001, NDCI released a handbook of ethical guidelines for drug court judges, prosecutors and defense attorneys. A more detailed discussion of confidentiality issues are discussed in that publication.

Federal Law

Federal law (42 U.S.C. §290dd-2; regulations at 42 C.F. R. §§2.1 to 2.67.), and various state laws, requires strict adherence to express confidentiality standards. Federal confidentiality laws take precedence over state laws, so that a state law may not authorize disclosure that is prohibited under a federal statute.

Although the strict definition of what constitutes a "program" (42 C.F.R.§2.11; amended by 60 Fed. Reg 22297 (May 5, 1995)) in federal law may not fit a particular drug court's

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program, the federal protections provide detailed guidance for developing policy and procedures to protect confidentiality. At the time of admission, for instance, there is a requirement that a client be given written notice of the law governing confidential information, and the exceptions to the general rule of non-disclosure (42 C.F.R. §2.22(a)).

Exceptions to non-disclosure are limited and highly scrutinized. Disclosure with consent of the client is usually accomplished through the signing of a consent form (See 42 C.F.R. §§2.31, and 2.33) . However, in designing a drug court program, defenders should insist on protections such as those adopted in North Carolina where consent to disclose is not a condition of treatment, and is limited to one year (see N.C.A.C. tit. 10, r.18D.0211, and 18D.0208(b)). To prevent problems with subsequent convictions, a clause should be inserted in the written consent form that statements from clients are made for the purposes of obtaining treatment, and the client does not knowingly, intelligently or voluntarily provide information for any other purpose.

Federal law requires that re-disclosure among drug court treatment parties must be in accordance with the client's reason for allowing conditional release of information, i.e. treatment and recovery activities only (42 C.F.R. §2.35). The client may at any time revoke previous written consent, and the revocation need not be in writing (42 C.F.R. §2.31(a)(8)).

Disclosure without consent applies to a crime committed or threatened on the premises of the treatment program, or if the client is suspected of child abuse or neglect (see generally 42 C.F.R. §2.65). It is important to note that these situations *permit* disclosure by the agency holding the relevant information, but do not *require* disclosure if the agency chooses to keep the information confidential. Disclosure can only be *compelled* through a court order accompanied by a subpoena, and a subpoena alone cannot authorize disclosure (42 C.F.R. §§2.61(a) and (b)(1)). Disclosure of client's records for criminal purposes by court order may be applied for by investigating or prosecuting agencies, and is only granted if all specified criteria are met. There must be an allegation of a serious crime, proof that disclosure would likely reveal information of "substantial value," and the entity holding the information must have the opportunity to be represented by independent counsel (42 C.F.R. §2.65(a)).

A court order for disclosure for patient records for noncriminal purposes may only be applied for by persons having a legally recognizable interest in the information sought, and if good cause exists. Good cause requires a showing that other means of obtaining the information are unavailable or ineffective, *and* the need for disclosure outweighs the potential injury to the client and treatment services being provided (42 C.F.R. §2.64(e)). Disclosure must again be limited only to those essential portions of the client's records.

If the Client is a Lawyer

The American Bar Association and several state bar associations have adopted special language for lawyers who represent substance-abusing lawyers in professional licensing proceedings (ABA Model Rules of Professional Conduct, Rule 8.3, DR 1-103(A)). The duty to report the misconduct of lawyers is suspended if that lawyer is getting assistance from the bar in an "approved lawyers' assistance program" for alcohol or drug recovery. Information that would be confidential had it been communicated subject to the attorney-client privilege cannot be disclosed.

Clients should be heartened by the emphasis in drug courts to promote recovery over prosecution. Defenders can promote drug court programs when there is policy ensuring that confidential personal information will be used for treatment and not misused for potential litigation. ■

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He is able who thinks he is able.

-Buddha

Scheduling of Drugs Under KRS Chapter 218 A and 902 KAR Chapter 55

Complete to November, 2002

CHR DRUG LIST BY SCHEDULE

SCHEDULE 1

A. OPIATES

1-methyl-4-phenyl-4-propionoxypiperidine (MPPP)
1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine (PEPAP)
3-methylfentanyl,N-3methyl-1-(2-phenylethyl)-4-piperidyl-N-phenylpropanamide
3-methylthiofentanyl,N-3-methyl-1-(2-thienyl)ethyl-4-piperidinyl-N-phenylpropanamide
Acetyl-alpha-methylfentanyl,N-[1-(1-methyl-2-phenyl)ethyl-4-piperidinyl]-N-phenylacetamide
Acetylmethadol
Allylprodine
Alphacetylmethadol [except Levo-acetylmethadol (LAMM)]
Alphameprodine
Alphamethadol
Alpha-methylfentanyl,N-1-(alpha-methyl-beta-phenyl)ethyl-4-Piperidyl propionanilide,1-(1-methyl-2-phenylethyl)-4-(N-propanilido)piperidine
Alpha-methylthiofentanyl,N-1-1-methyl-2-(2-thienyl)ethyl-4-piperidyl N -phenylpropanamide
Benzethidine
Benzylfentanyl,N-1-benzyl-4-piperidyl-N-phenylpropanamide
Betacetylmethadol
Beta-hydroxyfentanyl,N-1-(2-hydroxy-2-phenethy)l-4-piperidinyl-N-phenylpropanamide
Beta-hydroxy-3-methylfentanyl,N-1-(2-hydroxy-2 phenethyl)-3-methyl-4-piperidyl-N-phenylpropanamide
Betameprodine
Betamethadol
Betaprodine
Clonitazene
Dextromoramide
Dextrorphan
Diampromide
Diethylthiambutene
Difenoxin
Dimenoxadol
Dimepheptanol
Dimethylthiambutene
Dioxaphetylbutrate
Dipipanone
Drotebanol
Ethylmethylthiambutene
Etonitrazene
Etorphine (except the HCl salt)
Ethoxeridine
Furethidine
Hydroxypethidine
Ketobemidone
Levomoramide
Levophenacylmorphan
Morpheridine
Noracymethadol
Norlevorphanol
Normethadone
Norpipanone
Para-fluorofentanyl, (N-(4-flurophenyl)-N-1-(2-phenethyl)-4-piperidinyl propanamide
Phenadoxone
Phenampromide
Phenomorphan
Phenoperidine
Piritramide
Proheptazine
Properidine
Propiram
Racemoramide
Thenylfentanyl,N-1(2-thienyl)methyl-4-piperidyl-N-phenyl-propanamide
Thiofentanyl,-N-[1-(2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide
N-phenyl-N-1-(2-thienyl)ethyl-4-piperidinylpropan-amide
Tilidine
Trimeperidine

B. OPIUM DERIVATIVES

Acetorphine
Acetyldihydrocodeine
Benzylmorphine
Codeine Methylbromide
Codeine-N-Oxide
Cyprenorphine
Desmorphine
Dihydromorphine
Drotebanol
Etorphine
Heroin
Hydromorphinol
Methyldesorphine
Methyldihydromorphine
Morphine Methylbromide
Morphine Methylsulfonate
Morphine-N-Oxide
Myrophine
Nicocodeine
Nicomorphine
Normorphine
Phenylcodeine
Pholcodeine
Thebacon

C. HALLUCINOGENIC SUBSTANCES

1-1-(2-thienyl)cyclohexylpyrrolidine (TCPy)
2-Methylamino-1-phenylpropan-1-one(including, but not limited to, methcathione,Cat, and Ephedrone)
2,5-dimethoxy-4-ethylamphetamine (DOET)
2,5-dimethoxyamphetamine (2,5 DMA)
3,4 methylenedioxy amphetamine (MDMA)
3,4-methylenedioxy amphetamine
3,4-methylenedioxy-N-ethylamphetamine (N-ethyl-alpha-methyl-3,4(methylenedioxy) phenylethylamine,N-ethyl MDA,MDE,MDEA
3,4,5-Trimethoxyamphetamine
4-bromo-2,5-dimethoxy amphetamine (4-bromo-2,5-DMA,4 bromo-2,5dimethoxy-alpha-methylphenethylamine)
4-Methoxyamphetamine (PMA) 4-methoxy-alphamethylphen-ethylamineparamethoxyamphetamine)
4-Methyl-2,5-dimethoxyamphetamine
5-dimethoxyamphetamine
5-Methoxy-3,4 methylenedioxyamphetamine
Alpha-ethyltryptamine (alpha-ethyl-1H-indole-3-ethanamine,3-(2-aminobutyl)indole)
Bufotenine

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Diethyltryptamine
Dimethyltryptamine
Ethylamine analog of phencyclidine (N-ethyl-1-phenylcyclohexylamine, cyclohexamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl)ethylamine PCE)
Hashish
Ibogaine
Lysergic Acid Diethylamide
Marijuana
Mescaline
N-ethyl-3-piperidyl benzilate
N-hydroxy 3,4-methylenedioxyamphetamine (N-hydroxy-alpha-methyl-3,4(methylenedioxy)phenethylamine,N-hydroxy MDA)
N-Methyl-3-piperidylbenzilate
Para-fluorofentanyl,(N-(4fluophenyl)-N-1-(2phenyl)-4-piperidyl propanamide)
Parahexyl (Synhexyl) 3-Hexyl-1-hydroxy-7, 8, 9, 10-tetrahydro-6, 6, 9 trimethyl-6Hdibenzo b, d pyran)
Peyote
Phencyclidine
Psilocybin
Pyrrolidine analog of phencyclidine (1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP)
Tetrahydrocannabinols
Thiophene analog of phencyclidine (1-(1-(2-thienyl)cyclo-hexyl)piperidine, TCP, TPCP)

D. DEPRESSANTS

Gamma Hydroxybutric Acid
Mecloqualone
Methaqualone

E. STIMULANTS

3,4-methylenedioxymethamphetamine (MDMA)
4-methylaminorex(2-amino-4-methyl-5-phenyl-2-oxazoline
Aminorex (aminoxaphen,2-amino-5-phenyl-2-oxazoline,4,5-dihydro-5phenyl-2-oxazolamine
Cathione (2-amino-1-phenyl-1-propanone,alpha aminopropriophenone,2-aminopropiophenone,and norephedrone
(±)cis-4-methylaminorex ((±)cis-4,5-dihydro-4methyl-5phenyl-2-oxazolamine

Fenethylline

Methcathinone (2-(methylamino)-propiophenenone,alpha(methylamino)-propiophenone,alpha (methylamino)-propriphenone-2, (methylamino)-1-phenylpropane-1-one,alpha-N-methylamino-propiophenone,monomethylpropione, ephedrone, N-methylcathione, methylcathione, AL-464, AL-422,AL-463 and UR1431, its salts, optical isomers, and salts of optical isomers

SCHEDULE II

A. OPIOID NARCOTICS

1-Diphenyl-propane-carboxylic acid
2-Methyl-3-morpholino-1
4-Cyano-2-Dimethylamino-4
4-Diphenyl butane
Alphaprodine HCl—(Nisentel)
Anileridine
Benzitramide
Codeine
Dihydrocodeine
Diphenoxylate
Ethylmorphine
Etorphine Hydrochloride
Fentanyl
Granulated Opium
Hydrocodone
Hydromorphone (Dilaudid)
Isomethadone
Levo-alphacetylmethadol (LAMM)
Levomethorphan
Levorphanol (Levo-Dromoran)
Merperidine (Demeral, Pethadol)
Metazocine
Methadone (Dolophine)
Methadone Intermediate
Metapon
Moramide Intermediate
Morphine
Opium fluid
Opium Extracts
Opium Tincture
Oxycodone
Oxymorphone (Numorphan)
Pantopon (Hydrochloride, opium alkaloids)
Pethidine
Pethidine-Intermediate-A,4 cyano-1-methyl-4-phenylpiperdine
Pethidine-Intermediate-B ethyl-4-phenylpiperdine-4-carboxylate
Pethidine-Intermediate-C 1-methyl-4-phenylpiperidine-4-carboxylic acid
Phenazocine
Piminodine
Poppy Straw
Powdered Opium
Racemethorphan
Racemorphan
Raw Opium
Remifentanil
Raw Opium Extracts
Thebaine

B. COMBINATION OF OPIOIDS

Oxycodone & Acetaminophen tablets
Oxycodone HCl, Oxycodone Terephthalate & Aspirin tablets
Oxycodone with Acetaminophen
Oxycodone with Aspirin tablets
Percodan-Demi tablets
Percodan tablets
Tylox Capsules

C. HALLUCINOGENIC SUBSTANCES

Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of:
1-Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule is a U. S. Food and Drug Administration approved drug produce (some other names for dronabinol: [6aR-trans]-6a,7,8, or (-) delta-9-[trans]-tetrahydrocannabinol
2-Nabilone (another name for Nabilone): [+]-trans-3-(1,1-deimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one0

D. OPIATES

Alfentanil
Bulk Dextropropoxyphene (non-dosage form)
Carfentanil
Sufentanil

E. STIMULANTS

Adderall
Coca Leaves
Cocaine

Dextroamphetamine
Ecgonine
Methamphetamine
Methylphenidate
Phenmetrazine

SCHEDULE II - DEPRESSANTS

Amobarbita (Amytal)
Amobarbital + Secobarbital (Tuinal)
Glutethimide (Doredin)
Pentobarbital (Nembutal)
Secobarbital (Seconal)

1-Any drug approved by the United States Food and Drug Administration for marketing only as a suppository including Amobarbital, Pentobarbital or Secobarbital shall be in Schedule 11

2-Immediate Precursors
A material, compound, mixture or preparation which contains a quantity of the following:

a) Immediate precursors to amphetamine and methamphetamine

Phenyl-2-propanone
P2P
Benzyl methyl ketoneMethyl benzyl ketone

b) Immediate precursors to phencyclidine

1-phenycyclohexylamine
1-piperidineocyclohexaneecarbonitrile pcc

SCHEDULE III

SCHEDULE III
OPIOID NARCOTICS

A. PRODUCTS CONTAINING CODEINE

Aspirin with Codeine
Codimal PH
Empirin with Codeine
Fioricet with Codeine
Fiorinal with Codeine
Hycodan tablets
Nalline
Nucofed
Nucofed Experctorant Syrup with Codeine
Phenaphen with Codeine
Talwin; Pentazocine, all forms including its salts
Tylenol with Codeine # 1, 2, 3, and 4
Vanex-HD Liquid

B. PRODUCTS CONTAINING HYDROCODONE

Bancap
Codamine
Codiclear DH Syrup
Codimal PH Syrup
Co-Gesic tablets
Detussin, various
Duocet
Entuss D Liquid
Hitussin Ed Tuss HC liquid
Hycodan
Hycomine
Hycomine Pediatric Syrup
Hycotuss Expectorant
Hydrocodone Compound Syrup
Hydropane
Hydrophen
Hy-Phen Tablets
Lorcet
Lortab
Rolatuss with Hydrocodone
S. T. Forte.
S. T. Forte Liquid 2
Triamininc Expectorant DH
Tussaminic DH Forte
Tussanil DH Syrup
Tussionex
Vanex-HD

C. PRODUCTS CONTAINING OPIUM

Paragoric

SCHEDULE III
HALLUCINOGENIC SUBSTANCES

In addition to those listed in KRS 218A.090 the following are in Schedule III; a material compound, mixture or preparation which contains a quantity of DRONABINOL (synthetic) in sesame oikl and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved product. Dronabinol is also known as (6aR-trans)-6a, 7, 7, 10a tetrahydro-6, 6, 9-trimethyl-3-pentyl-6H-dibenzo[b, d] pyran-1-o1; or (-)-delta-9-(trans)-tetrahydrocannabinol

A. STIMULANTS

Benzphetamine
Chlorphentermine
Chlortermine
Phendimetrazine to include but not necessarily be limited to:

Adipost
Adipex-P
Anorex
Bontril PDM
Melfiat
Melfiat – 105 Unicells
Metra
Obalan
Obezine
Parzine
Phendiet
Phendiet 105
Plegine
Prelu-2
PT 105
Rexigen Forte
Wehless
Wehless-105 Timecells

B. AMPHETAMINE AND METHAMPHETAMINE COMBINATIONS

Any tablet or capsule combination of Amphetamine or Methamphetamin with any of the following substances:

Methamphetamine HCl 1 mg
Conjugated Estrogen Equine 0.25 mg
Methyltestosterone 2.5 mg

Any liquid containing in each 15 ccs:

Methamphetamine HCl 1 mg
Conjugated Estrogen Equine 0.25 mg
Methyltestosterone 2.5 mg

C. DEPRESSANTS

Any material, compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any of their salts and one or more active medicinal ingredients that is not a controlled substance. Any suppository form that contains amobarbital, secobarbital or pentobarbital approved only for use in suppository form. Any substance which contains any quantity of a derivative of chlorhexadol, glutethim-

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ide, lysergic acid, lysergic acid amide, methylprylon, sulfondiethylmethane, sulfonethylmethane, sulfone methane.

Tiletamine and zolazepam or any of their salts.
Other names for tiletamine are: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone
Other names for Zolazepam are: 4-(2-flurophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-(3,4-e)(1,4)diazepin-7(1H)-one, flupyrazpon

Butabarbital— Butisol
Chloral Hydrate
Mephobarbital
Metharbital
Methytprylon
Phenobaribtal
Sulfomethane
Sulfondiethylmethane
Sulfonethylmethane
Talbutal

SCHEDULE III
ANABOLIC STEROIDS

It is unlawful for a prescription or order to be written for an anabolic steroid; for such steroids to be distributed and/or sold for the following purposes:

- enhanced performance in exercise, sport, or game,
- the hormonal manipulation necessary to increase muscle mass, weight, strength, without a medical necessity and further it is unlawful for anyone to intentionally make or deliver an anabolic steroid whether in a pure or impure state and it is unlawful to possess an anabolic steroid for the purpose of illegal delivery or manufacturer.

The following anabolic steroids or a material compound mixture or preparation that may contain any of the following:

Boldenone
Chlorotestoserone
Clotesbol
Dihydromethyltestosterone
Dihydrotestosterone
Drostanolone
Ethylstrenol
Fluoxymesterone
Formebulone
Mesterolone
Methandranone
Methandienone
Methandriol
Methenolone
Methytestosterone
Mibolerone
Nandrolone
Nandrolone decanoate
Nandrolone phenpropionate
Norethandrolone
Oxandrolone
Oxymetholone
Oxymesterone
Oxymetholone
Stanolone
Stanozolol
Testolactone
Testosterone
Trenbolone

Exempt Anabolic Steroids

1- Androgen L.A., vial, NDC # 0456-1005
2- Androgen-Estro 90-4, vial, NDC # 0536-1605
3- SDepoANDROGYN, vial, NDC # 0456-1020
4- DEPO- T.E., vial, NDC # 52765-257
5- DepTESTEROGEN, vial, NDC # 51698-257
6- Duomone, vial, NDC # 52047-360
7- DURATESTRIN, vial, NDC # 43797-016
8- DUO-SPAN H, vial, NDC # 0684-0102
9- Estratest, tablet, NDC # 0031-1026
10- Estratest HS, tablet, NDC # 0032-1023
11- PAN SESTRA TEST, vial, NDC # 0525-0175
12- Premarin with Methyltestoserone, tablet, NDC # 0046-0879
13- Premarin with Methyltestosterone, tablet, NDC # 0046-0878
14- Synovex H pellets in process, drum
15- Synovex Plus , in process, drum
16- Synovex Plus, in process, granulation, drum
17- TEST-ESTRO Cypionate, vial NDC # 0536-9470
18- Testagen, vial, NDC # 55553-257
19- Testoderm, 4 mg/d, patch, NDC # 17314-4608
20- Testoderm, 6 mg/d, patch, NDC # 17314-4609
21- Testoderm, with adhesive, 6 mg/d, patch, NDC # 17314-2836
22- Testosterone Cyp 50 Estradiol Cyp 2, vial, NDC # 0814-7737
23- Testosterone Cypionate-Estradiol Cypionate Injection, vial, 54274-530
24- Testosterone Cypionate-Estradiol Cypionate Injection, vial, NDC # 0182-3069
25- Testosterone Cypionate-Estradiol Cypionate Injection, vial, NDC # 0634-6611
26- Testosterone Cypionate-Estradiol Cypionate Injection, vial, NDC # 04012-0257
27- Testosterone Cypionate-Estradion Cypionate Injection, vial, NDC # 0009-0253
28- Testosterone Enanthate-Estradiol Valerate Injection, vial, NDC # 0182-3073
29- Testosterone Enanthate-Estradiol Valerate Injection, vial, NDC # 0364-6618
30- Testosterone Enanthate-Estradiol Valerate Injection, NDC # 0402-0360
31- Tilapia Sex Reversal Feed (Investigational) Plastic Bags

SCHEDULE IV

Carisoprodal and ASA (Soma Compound)
Carispprodol and ASA with Codeine (Soma compound with Codeine
Chloral Hydrate——(Noctec, Somnos, Nycton, Lorinal, Chloraldurat)
Ethchlorvynol——(Placidyl)
Ethinamate——(Valmid)
Meprobamate——(Equanil, Miltown, Meprospan)
Paraldehyde
Petrichloral

A. STIMULANTS

Cathinel ((+)—Norpseudoephedrine)
Diethylpropion HCl—(Depletite-25; tenuate; Tepanil; Tenuate Dosespan; Tepanil Ten-Tabs)
Fencamfamin

Fenfluramine HCl—(Pondimin)
Fenproporex
Mazindol
Mefenorex
Modafinal
Pemoline, including organometallic complexes and chelates
Phenteramine
Pipradrol—(Detaril; Gerodyl; Meratran; Pipradol)
Sibotramine
SPA-1(-)—1-Dimethylamino-1,2-Diphenylathane

B. DEPRESSANTS

Alprazolam——(Xanax)
Bromazepam
Camazepam
Carisoprodol (Soma)
Chlordiazepoxide—(Librium; Libritabs; A-Poxide; Lipoxide; SK-Lygen; Murcil; Responsans-1-; Sereen)
Clobazam
Clonazepam—(Klonopin)
Chlorazepate—(Tranxene)
Clotiazepam
Cloxazepam—(Enadel; Sepazon)
Declorazolam
Diazepam—(Valium)
Estazolam—(Eurodin; Julodin)
Ethyl Loflazopate
Fludiazeopam
Flunitrazepam—(Rohypnol)
Fluazepam—(Dalmane)
Halazepam—(Paxipam)
Haloxazolam
Ketozolam
Lorazolam
Lorazepam—(Ativan; Emotival; Lorax; Psicopax; Tavor; Temesta)
Lormetazepam
Mebutamate—(W-583; Capla; Butatensin; Carbuten; Mebutina; Prean;)
Medazepam
Methohexital—(Brevital; Brevital Sodium; Brietal Sodium)
Midazolam
Nimetazepam
Nitrazepam—(Benozalin; Calsmin; Eunoctin)
Nordiazepam
Oxazepam—(Serax; Bonare; Serepax)
Oxazolam—(Serenal)
Pinazepam
Prazepam—(Dementrin; Verstran; Centrax)
Quazepam
Temazepam—(Myolastin; Restoril)
Tetrazepam
Triazolam—(Halcion)
Zaleplon
Zolpidem

C. ANALGESICS

Butorphanol
Dextropropoxyphene (Alpha-(+)-4-dimethylamino-1, 2-diphenyl-3-methyl-2-propionoxybutane

Not more than one (1) milligram of difenoxin and not less than twenty-five (25) micrograms of atropine sulfate per dosage unit.

Nalbuphine

SCHEDULE V

Not more than 200 milligrams (mg) codeine or any of its salts per 100 milliters (ml) or 100 Grams (Gm) of other medicinally beneficial product.

Not more than 100 milligrams (mg) of ethylmorphine per 100 milliters (ml) or 100 Grams (Gm) of other medicinally beneficial product.

Not more than 100 milligrams (mg) of Opium per 100 milliters (ml) or 100 Grams (Gm) of other medicinally beneficial product.

Not more than five-tenths (0.5) mg difenoxin and not less than 25 micrograms atropine sulfate per dosage unit.

Actifed with codeine Cough Syrup
Alamine ——(C Liquid)
Alamine Expectorant
Ambay Cough
Ambenyl Cough Syrup
Ambophen Expectorant
Anatuss with Codeine Syrup
BayCotussend Liquid
Bromanyl Expectorant
Bromphen DC with Codeine Cough
Buprenorphine HCl
Caldidrine Syrup
Cherocol Syrup
Codimal PH Syrup
Cophene-S Syrup
C-Tussin Expectorant
Deproist Expectorant with Codeine
Dihistine Expectorant
Dimetane DC Cough Syrup
Donnagel PG
Guiatuss DAC Liquid
Guiatussin DAC Syrup
Lomotil
Mytussin DAC Liquid
Naldecon-CX Suspension
Nucofed Pediatric Expectorant
Pediacof Cough Syrup
Phenergan Codeine Syrup
Phenergan VC with Codeine Syrup
Phenergan with Codeine Syrup
Phenhist DH with Codeine Liquid
Promethazine VC with Codeine
Promethazine with Codeine
Robitussin AC Syrup
Robitussin DAC Syrup
Robitussin with Codeine
Ru-Tuss with Hydrocodone Liquid
Ryna-CX Liquid
Triacin C. Syrup
Triafed with Codeine
Tussar 2 Cough Syrup
Tussar SF Cough Syrup
Tussi-Organidin NR
Tussirex
Tylenol with Codeine Elixir

EXCLUDED NON-NARCOTIC PRODUCTS

Phenobarb——Theophedrital—Amide tablets
Phenobarb-Guiaphed-Goldline-Elixir (liquid)
Phenobarb-Tedrigen Tablets-Goldline- Tablets
Chloral Hydrate- Choate's Leg Freeze-Hawthorne Products, Inc. – Liquid
Phenobarb-Bronkolixir- Sanofi-Winthrop – Elixir (liquid)
Phenobarb-Bronkotabs- Sanofi-Winthrop - Tablets

NOTE:
Use "CHR Drug Categories" as printed in the journal
Use "Changes" as printed in journal
Use "Administrative Regulations" as printed in journal
Use "References" as printed in journal

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ALPHABETICAL LISTING

The alphabetical listing does not provide a full description of the product. Please refer to the categorical listing to obtain descriptive information.

1-Diphenyl-propane-carboxylic acid - Schedule II-Opioid Narcotics
1-Dronabinol (Synthetic) - Schedule II-Hallucinogenic Substances
1 Methyl-4-phenyl-propionoxypiperdine (MMPP) - Schedule I Opiates
Phenylcyclohexylamine—Schedule II-Immediate precursor to phencyclidine
1-Piperidinocyclohexancecarbonitril-Schedule II, Immediate precursor to Phencyclidine
1-1-(2-Thienyl) cyclohexylpyrrolidine (TCPy) -Schedule I-Hallucinogenic Substances
1-(2-phenyl)-4-phenyl-4-acetoxypiperidine (PEPAP)-Schedule I Opiates
2-Methyl-3-morpholino-1—Schedule II Opioid Narcotics
2-Methylamino-1-phenylpropane-1-one (including but not limited to Methcathione, Cat, and Ephedrone-Schedule I – Hallucinogenic Substances
2-Nabilone-Schedule II- Hallucinogenic Substances
2,5-Dimethoxy-4-ethylamphetamine (DOET)—Schedule I Hallucinogenic Substances
2,5-Dimethoxyamphetamine(2,5 DMA)-Schedule I Hallucinogenic Substances
3-(+ or -)Cis-4-methylaminorex ((+ or -) Cis-4,5-dihydro-4-methyl-5phenyl-2-oxazolamine)—Schedule I-Stimulants
3-Methylfentanyl,N-[3-methyl-1-(2-phenylethyl)4-piperidyl]-N-phenylpropanamide—Schedule I- Opiates
3-Methylthiofenanyl,N-3methyl-1-(2thienyl)ethyl-4-piperdyl-N-phenylpropaneamide—Schedule I- Opiates
3,4 Methylenedioxymethamphetamine (MDMA)—Schedule I-Hallucinogenic Substances
3,4-Methylenedioxyamphetamine-Schedule I
3,4-Methylenedioxy-N-ethylamphetamine(N-ethylalpha methyl-3,4(methylenedioxy) phenethylamine,N-ethyl MDA, MDE, MDEA—Schedule I Hallucinogenic Substances
3,4,5-Trimethoxyamphetamine -Schedule I Hallucinogenic Substances
4-Bromo-2,5 dimethoxy -amphetamine (4-bromo-2,5-DMA,4-bromo-25-dimethoxy-alpha-methyphenethylamine) -Schedule I – Hallucinogenic Substances
4-Cyano-2-dimethylamino-4-Schedule II Opioid Narcotics
4-Diphenyl butane-Schedlue II- Opioid Narcotics
4-Methoxyamphetamine(PMA), 4-methoxy-alphamethylphenethylamine, paramethoxyamphetamine—Schedule I Hallucinogenic Substances
4-methyl-2,5-dimethoxylamphetamine-Schedule I- Hallucinogenic Substances
5-Methoxy-3,4 methylenedioxy amphetamine-Schedule I-Hallucinogenic Substancs

A

Acetorphine-ScheduleI-Opium Derivatives
Acetyl-Alpha-methylfentanyl,N-1-(1-methyl-2-phenethyl)-4piperidinyl-N-phenylacetamide Schedule I- Opiates
Acetyldihydrocodeine-Schedule I-Opium Derivative
Acetylmethadol-Schedule I-Opiates
Actifed with Codeine Cough Syrup-Schedule V
Adderall-Schedule II-Stimulants
Adipost - Schedule III-Phendimetrazine
Alfentanil-Schedule II-Opiates
Allylprodine-Schedule I- Opiates
Alphacetylmethadol [except Levo form; LAAM]-Schedule I-Opiates
Alpha-ethyltryptamine(alpha-ethyl-1 H-indole-3-ethanamine,3-(2-aminobutyl) indole)-Schedule I- Hallucinogenic Substances
Alphameprodine-Schedule I Opiates
Alphamethadol-Schedule I-Opiates
Alpha-methylfentanyl, N-1-(Alpha-methyl-beta-phenyl)ethyl-4-piperidyl propionanilide,1-(1-methyl-2-phenyethyl)-4-(N-propanilido) piperidine)-Schedule I opiates
Alpha-methylthiofentanyl, N-1-methyl-2-(2-thienyl) ethyl-4-4piperidinyl-n-phenylpropanamide-ScheduleI-Opiate3s
Alphaprodine HCl-(Nisentel)—Schedule II-Opiates
Alprazolam-(Xanax)-Schedule IV-Depressants
Ambenyl Cough Syrup—Schedule V
Ambophen Expectorant—Schedule V
Aminorex (aminoxaphen, 2 amino-5-phenyl-2-oxazoline,4,5-dihydro-5 phenyl-2-oxazolamine—Schedule I-Stimulants
Amobarbital+Secobarbital-(Tuinal)-Schedule II-Depressants
Anatuss with Codeine Syrup-Scheduel V
Androgen L.A., Exemp Anabolic Steroids
Andro-Estro 90-4-Exempt Steroid
Anileridine-Schedule II-opiates
Anorex-Schedule III-Phendimetrazine
Aspirin with Codeine-Schedule III-Opioid Narcotics

B

Benzethidine—Schedule I Opiates
Benzitramide—Schedule II Opiates
Benzphetamine (Didrex)-Schedule III Stimulants
Benzfentanyl, N-1-benzyl-4-piperidyl-N-phenyl propanamide-Schedule I Opiates
Benzylmorohine-Schedule I Opium Derivatives
Betacetylmethadol—Schedule I opiates
Beta-hydroxy-3-methylfentanyl,N-1-(2-hydroxy-2 phenylethyl)3-methyl-4-piperidinyl-N-pehnylpropanamide-Schedule I Opiates
Beta-Hydroxyfentanyl,N-1-(2-hydroxy-2phenyethyl)-4-piperidinyl-N-phenylpropanamide—Schedule I Opiates
Beta-hydroxyfentanyl-3-methylfentanyl, N-1-(2 hydroxy-2 phenylethyl)-3-methyl-piperidinyl-N-phenylpropanamide—Schedule I opiates
Betameprodine—Schedule I Opiates
Betamethadol—Schedule I Opiates
Betaprodine—Schedule I Opiates
Boldenone-Schedule III Anabolic Steroids
Bontril PDM - Schedule III Phendimetrazine
Bontril Slow Release-Schedule III Phendimetrazone
Bromanyl Expectorant—Schedule V
Bromazepam-Schedule IV Depressants

Bromphen DC with Codeine Cough Syrup—Schedule V
Bufotenine-Schedule I Hallucinogenic Substances
Bulk Dextropropoxyphene (non-dosage form)—Schedule II Opiates
Buprenorphine—Schedule V
Butabarbital-Butisol-Schedule III Depressants
Butorphanol-Stadol-Schedule IV Opioid

C

Calcidrine Syrup—Schedule V
Camazepam—Schedule IV
Carfentanil—Schedule II Opiates
Carisoprodol—Soma—Schedule IV
Carisoprodol & ASA-Soma Compound-Schedule IV
Carisoprodol & ASA with Codeine-Soma Compound with Codeine-Schedule IV
Cathinel ((+) Norpseudoephedrine)-Schedule IV –Stimulants
Cathinone (2-Amino-1-phenyl-1-propaneone, alpha aminoipropiophenone, 2-aminopropiophenone, and norephedrone - Schedule I Stimulants
Chloral Betain-Schedule IV
Chloral Hydrate-Schedule IV -Depressants
Chlordiazepoxide- (Librium,Libritabs,A-Poxide,SK Lygen,Murcil,Reosans-10,Sereen)-Schedule IV-Depressants
Chlorotestosterone-Schedule III-Anabolic Steroids
Chlorphentermine-Schedule III-Stimulants
Chlortermine-Schedule III –Stimulants
Clobazam—Schedule IV-Depressants
Clonazepam-(Clonopin)-Schedule IV-Depressants
Clonitazine—Schedule I—Opiates
Clorazepate-(Tranzene)-Schedule IV—Depressants
Clotesbol-Schedule III-Anabolic Steroids
Clotiazepam-Schedule IV-Depressants
Cloxazolam-(Enadel, Sepazon)-Schedule IV-Depressants
Cocaine-Schedule II-Stimulants
Cocoa Leaves-Schedule II-Stimulants
Codamine-Schedule III-Opioid Narcotics (Hydrocodone)
Codeine Methylbromide -Schedule I-Opium Derivatives
Codeine-N-Oxide-Schedule I Opium Derivatives
Codeine—Schedule II—Opiates
Codiclear DH Syrup-Schedule III-Opioid Narcotics (Hydrocodone)
Codimal PH Syrup—Schedule V
Co-Gesic tablets-Schedule III-Opioid Narcotics, Hydrocodone
Cophene-S Syrup—Schedule V
C-Tussin Expectorant—Schedule V
Cyprenorphine-Schedule I Opium Derivatives

D

Delorazepam-Schedule IV-Depressants
Dep. ANDROGYN, vial,-Exempt Anabolic Steroid
Depo T.E.—Exempt Anabolic Steroid
Deproist Expectorant with Codeine-Schedule V
DepoTESTROGN, vial-Exempt Anabolic Steroid
Desmorphine-Schedule I-Opium Derivatives
Detussin—Schedule III—Opioid Narcotics, Hydrocodone
Dextroamphetamine-Schedule II-Stimulants
Dextromoramide-Schedule I-Opiates
Dextropropoxyphene-(Darvon)-Schedule IV, analgesics
Dextrorphan—Schedule I—Opiates
Diampromide—Schedule I—Opiates
Diazepam-(Valium)-Schedule IV, Depressants
Diethylpropion HCl-(Deplete-25, Tenuate, Tempanil, Tenuate Dospan, Tempanil Ten-Tabs)-Schedule IV-Stimulants
Diethylthiambutene-Schedule I-Opiates
Diethyltryptamine-Schedule I-Hallucinogenic Substances
Difenoxin—Schedule I—Opiates
Dihistine Expectorant—Schedule V
Dihydrocodeine—Schedule II Opiates
Dihydromorphine-Schedule I-Opium Derivatives
Dihydrotesttosterone-Schedule III-Anabolic Steroids
Dimenoxadol—Schedule I—Opiates
Dimepheptanol—Schedule I—Opiates
Dimetane DC Cough Syrup-Schedule V
Dimethylthiambutene-Schedule I-Opiates
Dimethyltryptamine-Schedule I-Hallucinogenic Substances
Dioxaphetylbutrate-Schedule I-Opiates
Diphenoxylate-Schedule II-Opiates
Dipipanone—Schedule I—Oiates
Donnagel P.G.—Schedule V
Dronabinol (Synthetic)-Schedule III-Hallucinogenic Substances
Drostanolone-Schedule III-Anabolic Steroids
Drotebanol-Schedule I-Opium Derivatives
Duocet-Schedule III-Opioid Narcotics, Hydrocodone
Duomone, vial-Exempt Anabolic Steroid
Due-SPAN II, vial-Exempt Anabolic Steroid
DURATESTRIN, vial-Anabolic Steroid

E

Econine—Schedule II—Stimulants
Empirin with Codeine-Schedule III, Opioid narcotics
Estazolam, (Eurodin, Julodin)-Schedule IV-Depressants
Estratest tablets-Exempt Anabolic Steroid
Estratest HS Tablet-Exempt Anabolic Steroid
Ethchlorvynol-(Placidyl)-Schedule IV
Ethinamate—(Valmid)—Schedule IV
Ethylamine, analog of Phencyclidine-Schedule I—Hallucinogenic
Ethylestrenol-Schedule III-Anabolic Steroid
Ethyl Loflazopate-Schedule IV Depressants
Ethylmethylthiambutene-Schedule I-Opiates
Ethylmorphine—Schedule II—Opiates
Etonitazene—Schedule I—opiates
Etorphine, (except the Hydrochloride Salt) Schedule I—Opium Derivatives
Etoxeridine—Schedule I—Opiates

F

Fencamfamin-Schedule IV-Stimulants
Fenethylline-Schedule I-Stimulants
Fenfluramine HCl-(Pondimin)-Schedule IV-Stimulanys
Fenproporex-Schedule IV-Stimulants
Fentanyl-(Sublimaze)-Schedule II-Opiates
Fiorinal with Codeine-Schedule III-Opioid Narcotics, Codeine
Fludiazeopam-Schedule IV-Depressants
Flunitrazepam-(Rohypnol)-Schedule IV-Depressants

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Fluoxymesterone-Schedule III-Anabolic Steroids
Fluazepam-(Dalmane)-Schedule IV-Depressants
Formebulone-Schedule III-Anabolic Steroids
Furethidine—Schedule I—Opiates

G

Gamma hydroxybutric Acid-Schedule I-Depressants
Glutethimide (Doredin)-Schedule II-Depressants
Granulated Opium-Schedule II -Opioid Narcotics
Guiatuss DAC Syrup Liquid - Schedule V
Guiatussin—DAC, Liquid—Schedule V

H

Halazepam-(Paxipam)-Schedule IV-Depressants
Haloxazolam-ScheduleIV-Depressanst
Hashish-Schedule I-Hallucinogenic Substances
Heroin-Schedule I-Opium Derivatives
Histussin HC—Schedule III—Opioid Narcotics, Hydrocodone
Hycodan-Schedule III-Opioid Narcotics, Hydrocodone
Hycomine Pediatric Syrup-Schedule III-Opioid Narcotics, Hydrocodone
Hycomine-Schedule III-Opioid Narcotics, Hydrocodone
Hycotuss Expectorant-Schedule III-Opioid Narcotics, Hydrocodone
Hydrocodone Compound Syrup-Schedule III- Opioid Narcotics, Hydrocodone
Hydrocodone—Schedule II—Opiates
Hydromorphinol-Schedule I-Opium Derivatives
Hydromorphone-(Dilaudid)-Schedule II Opiates
Hydropane-Schedule III-Opioid Narcotics, Hydrocodone
Hydrophen-Schedule III-Opioid Narcotics, Hydrocodone
Hydroxypethidine-Schedule I-Opiates
Hy-Phen Tablets-Schedule III-Opioid Narcotics, Hydrocodone

I

Iobgaine-Schedule I-Hallucinogenic Substances
Iophen-C Liquid—Schedule V
Isomethadone—Schedule II—Opiates

K

Ketobemidone—Schedule I—Opiates
Ketozolam-Schedule IV-Depressants

L

Levo-alphacetylmethadol (LAMM)-Schedule II-Opiates
Levomoramide—Schedule I—Opiates
Levomethorphan-Schedule II-Opiates
Levorphanol (Levo-Dromeran)-Schedule II-Opiates
Levophenacylmorphan-Schedule I-Opiates
Lomotil—Schedule V
Loprazolam-Schedule IV-Depressants
Lorazepam
(Ativan,Emotoval,Temesta)-Schedule IV -Depressants
Lorcet-Schedule III-Opioid Narcotics, Hydrocodone
Lormetazepam-Schedule IV-Depressants
Lortabs-Schedule III-Opioid Narcotics, Hydrocodone
Lormetazepam-Schedule IV-Depressants
Lortab-Schedule III-Opioid Narcotics, Hydrocodone
Lysergic Acid Diethylamide-Schedule I-Hallucinogenic Substances

M

Marijuana-Schedule I-Hallucinogenic Substances
Mazindol—Schedule IV—Stimulants
Mebutamate (Capla, Butatensin, Carbuten,etc.)-Schedule IV-Depressants
Mecloqualone-Schedule I-Depressants
Medazepam
(Ansilan,Diepin,Nobrium)-Schedule IV-Depressants
Mefenorex—Schedule IV—Stmulants
Melfiat 105 Unicells-Schedule III-Phendimetrazine
Menogen-Schedule III-Anabolic Steroids
Menogen HS-Schedule III-Anabolic Steroids
Meperidine (Demerol, Pethadol)-Schedule II-Opiates
Mephobarbital-Schedule III-Depressants
Meprobamate (Equanil, Miltown)-Schedule IV
Mescaline-Schedule I-Hallucinogenic Substances
Mesterolone -Schedule III -Anabolic Steroids
Metazocine—Schedule II—Opiates
Methadone (Dolophine)-Schedule II-Opiates
Methadone Intermediate-Schedule II-Opiates
Methamphetamine-Schedule II-Stimulants
Methandienone-Schedule III-Anabolic Steroids
Methandrone-Schedule III-Anabolic Steroids
Methandriol-Schedule III-Anabolic Steroids
Methaqualone (Quaalude)-Schedule 1-Depressants
Metharbital-Schedule III-Depressants
Methcathione-Schedule I-Stimulants
Methohexital (Brevital)-Schedule IV-Depressants
Methyldesorphine-Schedule I-Opium Derivatives
Methyldihydromorphine-Schedule I-Opium Derivatives
Methylphenidate-Schedule II-Stimulants
Methyltestosterone-Schedule III-Anabolic Steroids
Methyprylon-Schedule III-Depressants
Metopon—Schedule II—Opiates
Mibolerone-Schedule III-Anabolic Steroids
Midazolam-Schedule IV-Depressants
Modafinil—Schedule IV—Stimulants
Moramide-Intermediate-ScheduleII-Opioid Narcotics
Morpheridine—Schedule I—Opiates
Morphine Methylbromide-Schedule I—Opium Derivatives
Morphine Methylsulfonate-Schedule I-Opium Derivatives
Morphine-N-Oxide—Schedule I—Opium Derivatives
Morphine Sulfate—Schedule II—Opiates
Morphine-Schedule I-Opium Derivatives
Mytussin DAC Liquid—Schedule V

N

N-ethylamphetamine-Schedule I-Stimulants
N-ethyl-3-piperdyl benzilate-Schedule I-

Hallucinogenic Substances
N-hydroxy-3,4-methylenedioxyamphetamine (N-hydroxy-alpha-methyl-3,4(methylene dioxy) phenethylamine,N-hydroxy MDA)-Schedule I-Hallucinogenic Substances
Nalbuphine-Schedule IV-Narcotics
Naldecon-CX Suspension-Schedule V
Nalline-Schedule III—Opioid Narcotics
Nandrolone-Schedule III-Anabolic Steroids
Nicocodeine-Schedule I-Opium Derivatives
Nicomorphine-Schedule I-Opium Derivatives
Nimetazepam-Schedule IV-Depressants
Nitrazepam-Schedule IV-Depressants
N-methyl-3-piperdyl benzilate-Schedule I-Hallucinogenic Substances
N,N,alpha-trimethylphenylamine-Schedule I-Stimulants
N,N-dimethylamphetamine-Schedule I-Stimulants
Noracymethadol-Schedule I-Opiates
Nordiazepam-Schedule IV-Depressants
Norethandrolone-Schedule III-Anabolic Steroids
Norlevorphanol-Schedule I—Opiates
Normethadone-Schedule I—Opiates
Normorphine-Schedule I-Opium Derivatives
Norpipanone—Schedule I—Opiates
Nucofed Expectorant Syrup with Codeine-Schedule III-Opioid Narcotics, Codeine
Nucofed Pediatric Expectorant-Schedule V
Nucofed-Schedule III-Opioid Narcotics, codeine

O

Obalan - Schedule III - Phendimetrazine
Opium Extracts-Schedule II-Opiates
Opium Fluid—Schedule II-Opiates
Opium Poppy Straw-Schedule II-Opiates
Opium Powder—Schedule II-Opiates
Opium Tincture—Schedule II-Opiates
Oxandrolone-Schedule III-Anabolic Steroids
Oxazepam-(Serax)-Schedule IV-Depressants
Oxazolam-(Serenel)-Schedule IV-Depressants
Oxycodone & Acetaminophen tablets-Schedule II - Combination of Opioids
Oxycodone HCl, Oxycodone Terephalate & ASA-Schedule II - Combination of Opioids
Oxycodone HCl-Schedule II-Opiates
Oxycodone with Acetaminophen-Schedule II-Combination of Opioids
Oxycodone with ASA-Schedule II-Combination of Opioids
Oxymesterone-Schedule III-Anabolic Steroids
Oxymetholone-Schedule III-Anabolic Steroids
Oxymorphone-Schedule II-Opiates

P

PAN ESTRA TEST, vial, Exempt-Schedule III-Anabolic Steroids
Pantopon—Schedule II—Opiates
Para-fluorofentanyl(N-(4-fluorphenyl)-N-1(2phenyethyl)4 peperidinylpropanamide-Schedule I-Opiates
Parahexyl(Synhexyl,3 Hexyl-1-hydroxy-7,8,10-tetrahydro-6,6,9-triethyl-6Hdibenzo b,d pyran)-Schedule I-Hallucinogenic Substances
Paraldehyde—Schedu,le IV
Paregoric—Schedule IV
Pedicof Cough Syrup—Schedule V
Pemoline—Schedule IV—Stimulants
Pentobarbital (Nembutal)-Schedule II-Depressants
Percodan-Demi Tablets-Schedule II-Combinations of Opioids
Percodan Tablets-Schedule II-Combinations of Opioids
Pethidine—Schedule II—Opiates
Pethidine Intermediate A 4cyano-1-methyl-4-phenylpiperidine-Schedule II-Opiates
Pethidine Intermediate B ethyl-4-phenylpiperdine-4-carboxylate-Schedule II-Opiates
Pethidine Intermediate C 1 methyl-4-phenylpiperdine- 4-carboxlic acid-Schedule II-Opiates
Petrichloral-Schedule IV-Depressants
Peyote-Schedule I-Hallucinogenic Substances
Phenadoxone—Schedule I—Opiates
Phenapromide—Schedule I—Opiates
Phenaphen with Codeine-Schedule III-Opioids
Phenazocine—Schedule II—Opiates
Phencyclidine-Schedule I-Hallucinogenic Substances
Phendimetrazine-Schedule III-Stimulants
Phenergan Codeine Cough Syrup-Schedule V
Phenergan VC with Codeine Syrup-Schedule V
Phenhist DH with Codeine Liquid-Schedule V
Phenmetrazine-Schedule II-Stimulants
Phenobarbital-Schedule III-Depressants
Phennmorphan-Schedule I-Opiates
Phenoperidine—Schedule I—Opiates
Phentermine—Schedule IV-Stimulants
Phentermine HCl (Fastin, Ionamin, etc.)-Schedule IV-Stimulants
Phenylacetone –other names include phenyl-2-propanone, P2P, benzyl methyl ketone and methylbenzylketone-Schedule II-Immediate precursor to Amphetamine
Phenylcodeine-Schedule I-Opium Derivatives
Phenzne—Schedule III—Stimulants
Pholcodeine-Schedule I-Opium Derivatives
Piminodine—Schedule II—Opiates
Pinazepam-Schedule IV-Depressants
Pipradol—Schedule IV—Stimulants
Piritramide—Schedule I—Opiates
Plegine—Schedule II—Stimulants
Powdered Opium-Schedule II-Oppiates
Prazepam (Centrax)-Schedule IV-Depressants
Prelu-2-Schedule III-Stimulants
Premarian with Methyltestosterone (several formulations)-Schedule III-Exempt Anabolic Steroids
Proheptazine—Schedule I—Opiates
Promethazine with Codeine-Schedule V
Promethazine VC with Codeine-Schedule V
Properidine—Schedule I-Opiates
Propiram—Schedule I—Opiates
Psilocybin-Schedule I-Hallucinogenic
Psilocyn—Schedule I—Hallucinogenic
Pyroralerone—Schedule V
Pyrrolidine-Schedule I-Hallucinogenic

Q

Quazepam—Schedule IV—Depressants

R

Racemorphan—Schedule II—Opiates
Racemoramide—Schedule I—Opiates

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Racemorphan—Schedule II—Opiates
Raw Opium—Schedule II—Opiates
Raw Opium Extracts-Schedule II-Opiates
Remifentanil—Schedule II—Opiates
Robitussin AC cough Syrup—Schedule V
Robitussin DAC Syrup—Schedule V
Rolatuss with Hydrocodone-Schedule III-Hydrocodone
Ru-Tuss with Hydrocodone Liquid-Schedule V
Ryna-CX Liquid—Schedule V

S

Secobarbital—Seconal—Schedule II—Depressants
Sibutramine—Schedule IV—Stimulant
Soma—Schedule IV—Muscle Relaxant
Soma Compound—Schedule IV—Muscle Relaxant
Soma Compound with Codeine—Schedule IV—Muscle Relaxant
SPA-((-)-1-Dimethylamino)-1,2-Dyphenylathane-Schedule IV-Stimulants
Stadol NS—Schedule Opioid
Stanolone-Schedule III-Anabolic Steroid
Stanozolol—Schedule III—Anabolic Steroid
S.T.Forte—Schedule III—Opioids Hydrocodone
S.T.Forte 2—Schedule III—Opioids Hydrocodone
Sufentanil—Schedule II—Opiates
Sufentanil (Sufenta)-Schedule II-Opiates
Sulfomethane-Schedule III-Depressants
Sulfondiethylmethane-Schedule III-Depressants
Sulfonethylmethane-Schedule III-Depressant
Synovex H Pellets in Process, etc. -Schedule III-Exempt Anabolic Steroids

T

Talbutal—Schedule III—Depressants
Talwin, Pentazocine, all forms and all salts—Schedule III—Opioid Narcotics
Temazepam-Schedule IV—Depressants
TEST-ESTRO Cypionate—Schedule III—Exempt Anabolic Steroid
Testagen, vial-Schedule III-Exempt Anabolic Steroid
Testoderm (several formulations)-Schedule III—Steroids
Testolactone—Schedule III—Steroids
Testosterone CYP 50 Estradiol (several concentrations)—Schedule III—Steroids
Testosteronepropionate-Schedule III-Steroids
Tetrahydrocannabinols-Schedule I-Hallucinogenic Substances
Tetrazepam-Schedule IV-Depressants
Thebacon-Schedule I-Opium Derivatives
Thebain—Schedule II—Opiates
Thenylfentanyl,N-1-(2-thienyl) methyl-4-piperidyl N-phenyl-propanamide-Schedule I—Opiates
Thiofentanyl-N-phenyl-N-1-(2-thienyl)ethyl-4-piperidnylpropane-amide Thiophene analog of phencyclidine-Schedule I-Hallucinogenic Substances
Tilapia Sex Reversal Feed-Schedule III, Exempt Steroid
Tiletamine-Schedule III-Depressant
Tilidine—Schedule I—Opiates
Tincture of Opium-Schedule II-Opiates
Tolu-Sed Cough Syrup—Schedule
Trenbolone—Schedule III—Steroids
Triacin C Syrup—Schedule V
Triafed with Codeine—Schedule V
Triaminic Expectorant with Codeine-Schedule III-Opioid
Tussaminic DH Forte-Schedule III-Opioid
Tussar 2 Cough Syrup—Schedule V
Tussar SF Cough Syrup—Schedule V
Tussionex—Schedule III—Opioid Narcotics
Tuss-Organidin Liquid—Schedule V
Tussirex with Codeine Liquid-Schedule V
Tylenol with Codeine (several concentrations)—Schedule III—Opioid
Tylenol; with Codeine Elixir-Schedule V
Tylox Capsules-Schedule II-Combination of Opioids

V

Vanex-HD Liquid-Schedule III-Opioid

W

Weh-Less—Schedule III—Stimulants
Wehless 105-Timecells-Schedule III-Stimulants

Z

Zolazepam—Schedule III—Depressant
Zolpidem (Ambien)-Schedule IV-Depressant

Inquires may be addressed to Ms. Dana Droz, R. Ph., Attorney, Pharmacy Services Program Manager, Department of Health Services, (502) 564 7985; or Helen Danser, R.Ph., Consultant Pharmacist, Department for MH/MR, Div. Substance Abuse, 502 564-2880.■

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Words are, of course, the most powerful drug used by mankind.

-Rudyard Kipling

MATERIALS ON: DRUGS

The following is a listing of the library's resources on issues relating Drugs. Please see one of the librarians for help with locating additional sources, such as journal articles or Internet resources.

Browsing Areas: The DPA uses the Library of Congress classification system. In the DPA library, resources on Drugs and drug use can be found in the HV 5825 and RM & RS classification. The major law libraries in Kentucky also have a lot of material on Drugs and drug use.

UK's library catalog can be found on the Internet at: http://infokat.uky.edu/. U of L has its catalog available at: http://minerva.louisville.edu/ and NKU's catalog can be accessed at: http://nku.kyvl.org/

Book List: All DPA staff have borrowing rights in the main library. People not affiliated with the DPA may also be allowed to borrow. This is decided on a case-by-case basis.

- *Compendium of Drug & Patient Information* (Pediatrician's ed.). Compendium of drug & patient information: a publication of the biomedical Information Corporation. [Pediatrician's ed.]. **Located in Morehead.**
- *The Complete Drug Reference.* Yonkers, NY: Consumer Reports Books, [1991-]. **RS 51 .U65 1993**
- *Drug Abuse and the Law Sourcebook.* New York, NY: C. Boardman, [1983 -]. By Gerald Uelman & Victor G. Haddox. **Located in Richmond.**
- Drugs, Crime, and the Justice System: A National Report from the Bureau of Justice Statistics. Washington, DC: The Bureau, [1992]. **HV 5825 .D828 1993**
- *Drugs of Abuse.* 1988 Edition. (Washington, DC: U.S. Dept of Justice, Drug Enforcement Administration), [1988]. **RM 328 .D76 1988**
- *Essential Guide to Psychiatric Drugs, The*. 3rd ed. By. Jack M. Gorman (New York, NY St. Martin's Griffin), [1997]. **Located in Capital Post-Conviction.**
- *Gender and Justice: Women, Drugs, and Sentencing Policy.* By Mauer, Marc and Wolf, Richard. Washington, DC: The Sentencing Project, [1999]. **HV 6046 .M369 1999**
- *Getting Tough on Gateway Drugs: A Guide for the Family.* By Robert L. DuPont. (Washington, DC: American Psychiatric Press), [1984]. **HV 5825 .D95 1984**
- *Manual of Clinical Psychopharmacology*. 3rd ed. Alan F. Schatzberg and Charles DeBattista. (Washington, DC: American Psychiatric Press), [1997]. **Located in Capital Post-Conviction.**
- Modern Policing and the Control of Illegal Drugs: Test*ing New Strategies in Two American Cities.* By Uchida, Craig D and Annan, Sampson O. Washington, D.C: U.S. [1992]. **HV 8079 .N3 U28 1992**
- *National Institute of Justice (U.S.). Searching for Answers: Research and Evaluation on Drugs and Crime.* Washington, D.C: U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, [1990-]. **HV 5825 .N348a**
- *Physicians' Desk Reference: PDR*. 2002 Ed. (Oradell, N.J: Medical Economics Co). **RS 75 .P5 2002**
- *Physicians' Desk Reference Companion Guide*. 2002 Ed. (Montvale, NJ: Medical Economics). **RS 75 .P37 2002**
- *Physicians Desk Reference for Nonprescription Drugs*. [Oradell, NJ]: Medical Economics Co. **Located in Eddyville.**
- *State Drug Resources, ... National Directory.* Washington, D.C: The Bureau. **HV 5825 .S66 1992**

Periodicals: DPA does not currently carry any periodicals specifically on drugs and drug use.

DPA Training Videos: Videos may be accessed by contacting either of the DPA librarians. As originals do not circulate, the librarians will arrange for the tape to be copied. DPA offices and divisions will be charged for the cost of the tape (billed directly to the office or division account). Others will be asked to reimburse the cost of the tape and the cost of shipping. **Under no circumstances should prosecuting attorneys be allowed to view DPA produced videotapes.** An index to the training video and handout libraries is available on the Library's Intranet page.

VIDEOS

V-224 (d) Drug Analysis. (1:15) 1986. Pat Donley & Jack Benton.

V-241 (b) Alcohol and Drugs in Perspective. (1:00) R. Miller.

V-277 (b) Defending Drug Cases.1989. Gerald Goldstein. Accompanies H-88.

V-288 Voir Dire in Drug Cases. 1990. Joseph Johnson. Accompanies H-448.

V-293 a) Evidentiary Issues in Drug Cases. David Niehaus. Accompanies H-159.

V-333 (b) Defending Drug Cases. (0:56) Marty Pinales. Accompanies H-113.

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V-364 Drugs of Abuse: Detection and Pharmacokinetics. Sam Morris.

V-367 (a) Substance Abusing Clients. Robert Walker. Accompanies H-613.

V-543 Voir Dire in Sexual Abuse Cases, Drug Cases, Cases with No Defense, and on Special Issues of Race, Defendant with Record, Aggravating Evidence. Robert Hirchhorn. Accompanies H-444.

V-607 Alcohol, Drugs, and Violence in the Workplace. Eric Drogin, Rob Riley, Trina J Jennings & George Sornberger. Accompanies H-593.

V-622 Components of Community-Based Substance Abuse Treatment Programs. Joan Wagner, Nancy Evans & James Young.

V-640 Creating Successful Outpatient Substance Abuse Plans for Indigents and Convincing Prosecutors and Judges. Joan Wagner, Nancy Evans & James Young.

V-691 DISMAS: Drug Treatment: We Have the Answer Joan Wagner & James Young.

V-701 Alcohol, Drugs, and Violence in the Workplace: Our Ethical Duties. Eric Drogin, George Sornberger & Rob Riley. Accompanies H-593.

V-704 Defending Drug Cases. Leo Smith. Accompanies H-517.

V-705 Drug Case Preparation and Defenses: "I Knew That". John Delgado. Accompanies H-589.

V-706 Witchcraft Plus Voodoo Equals the Conviction of an Innocent Man. Don Heavin. Accompanies H-520.

V-718 & V-719 Laboratory for Justice: Illicit Drug Analysis as Evidence. Max Solomon & Jim Martorano. Accompanies H-536.

V-724 Working Understanding of Addiction. Ted Godlaski. Accompanies H-534.

V-770 Substance Abuse as Mitigation. Ellen Blau.

V-882 Ethics: Lawyers and Substance Abuse. Don Major & Vanessa Armstrong.

V-900 Thematic Motion Practice: Drug Cases & Drug Court. Riley & Ward.

V-923 Drug Courts. Webber, Linn & Polk.

V-977 Defending Crystal Meth Cases. Burt Shostak. Accompanies H-711.

V-989 Narcotics. Diana Queen.

V-990 Your Question on Crystal Meth. Burt Shostak. Acompanies H-711.

V-1105 Addiction: When is a Choice a Choice? 30th Annual DPA Seminar 06/12/02. Mark Baker & Rob Adams. Accompanies H-847.

Handouts: All handouts are available to DPA staff via the library page of the DPA Intranet. If you are unsure how to access the Intranet, please contact the DPA's Helpdesk. Defense attorneys not affiliated with DPA may request copies of handouts by contacting either Will Hilyerd or Sara King.

H-7 Alcohol and Other Drugs in Perspective: The Criminal Justice Connection.15th Annual DPA Seminar: 1987. 10 p. Accompanies V-241.

H-12 An Inside Look [play presented at Frankfort Career Development Center, relating to drug use]. 1987. 34 p. Carlton Doran.

H-113 Defending a Drug Case.19th Annual DPA Seminar: 1991. 45 p. Marty Pinales. Accompanies V-333.

H-159 Evidentiary Issues in Drug Cases. 18th Annual Public Defender Conference: 1990.15 p. David Niehaus. Accompanies V-293.

H-371 Sample Voir Dire of Chemists in a Drug Case. 1977. 82 p. James Shellow.

H-461 Representing the Medicated Client. 1983. 3 p. Jan Costello.

H-493 Alcohol, Drugs, and Violence in the Workplace. 24th Annual Public Defender Conference: 1996. 90 p. Rob Riley, George Sornberger, Eric Drogin & Trina Jennings. Accompanies V-607.

H-517 Defending Drug Cases. 25th Annual Public Defender Conference: 1997. 12 p. Leo Smith. Accompanies V-704.

H-520 Witchcraft + Voodoo = The Conviction of an Innocent Man. 25th Annual Public Defender Conference: 1997.18 p. Don Heavrin. Accompanies V-706.

H-534 A Working Understanding of Addiction. 25th Annual Public Defender Conference: 1997. 12 p. Ted Godlaski. Accompanies V-724.

H-536 Laboratory for Justice: Illicit Drug Analysis as Evidence. 25th Annual Public Defender Conference: 1997. 57 p. Jim Martorano & Max Solomon. Accompanies V-718 & V-719.

H-537 Drug Misuse, Abuse, and Addiction: What Public Defenders Need to Know. 25th Annual Public Defender Conference: 1997. 65 p. Patrick Sammon.

H-589 Drug Case Preparation and Defenses: Rules of the Justice Game. 25th Annual Public Defender Conference: 1997. 34 p. John Delgado. Accompanies V-705.

H-593 Alcohol, Drugs and Violence: The Effect on Your Ability to Practice. 25th Annual Public Defender Conference: 1997. 10 p. Rob Riley. Accompanies V-607 & V-701.

H-597 Defending a Drug Case. 19th Annual Public Defender Conference: 1991. 47 p. Marty Pinales.

H-613 Substance Abusing Clients; Defense and Treatment. 20th Annual Public Defender Conference: 1992. 2 p. Robert Walker. Accompanies V-367.

H-711 Defending Crystal Meth. : U.S. v. Eschman. 28th Annual Public Defender Conference: 2000. 199 p. Burt Shostak. Accompanies V-977 & V-990.

H-847 Addiction: When is a Choice a Choice? 30th Annual DPA Seminar 06/12/02. Mark Baker & Rob Adams. Accompanies V-1105.

Reference Service: DPA has two librarians who can help you locate additional material covering drug and drug use issues.

Internet Resources: The Internet (accessible from all DPA offices via Microsoft Internet Explorer) is a tremendous source of information. It should, however, be used with certain caution - - remember to check when the information was last updated and make sure you use a site whose authority on the subject you can trust. Persons not associated with DPA can contact their local University or Public librarian(s) for assistance if they are unsure of how best to locate information on the Internet.

Electronic Resources: In addition to case and statutory materials, Westlaw offers access to several searchable databases that contain information drugs and drug use. While standard DPA passwords cannot access these databases, the passwords held by the librarians have access to all information on Westlaw. Contact one of the DPA librarians for assistance or further information about these databases. You must have your supervisors permission to ask the DPA librarians for material not included in our contract as this material will carry extra charges.

Other Electronic Resources: We also currently subscribe to the FirstSearch online service. This service includes Worldcat, which provides access to numerous library catalogs and databases nationwide.

Contact the DPA librarians to obtain information from, or more information about, these resources. ■

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Recruitment

Gill Pilati

The Kentucky Department of Public Advocacy is recruiting for staff attorneys to represent the indigent citizens of the Commonwealth of Kentucky for the following locations:

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For further information and employment opportunities, please contact:

Gill Pilati
DPA Recruiter
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel:(502)564-8006; Fax:(502)564-7890
E-mail: gpilati@mail.pa.state.ky.us

There Has Been a Steep Decline in Violent Juvenile Crime

Crime Rates

Nationally, the FBI has reported that in 2000 the national crime index reached its lowest measure since 1978, as it decreased slightly from 1999 (0.2 percent).[1] Five and ten year trends indicate that the 2000 national total was 14.0% lower than in 1996 and 22.0% lower than in 1991. *Id.* at p.6. Violent crimes nationally in 2000 also decreased slightly from 1999 (0.1 percent). *Id.* at p. 11. However, the 2000 volume is the lowest violent crime total since 1985 and is a decline of 15.6% from the 1996 level and a 25.5% decrease from the 1991 level. *Id.* at p. 12. The U.S. Department of Justice reports that violent crime rates for adults and juveniles have declined since 1994, reaching the lowest level ever recorded in 2000.[2] U.S. DOJ also reports that the proportion of serious violent crimes committed by juveniles has declined since 1993. *Id.* In 2000, 1 in 5 serious violent crimes were committed by juveniles, down from 1 in 4 in 1993. *Id.*

Arrest Rates Generally

Nationally, 17% of all persons arrested in 2000 were juveniles, and 5.5% of all persons arrested were under the age of 15.[3] Juveniles were involved in 16% of all Violent Crime Index arrests and 32% of all Property Crime Index arrests in 2000.[4] In 1996, the juvenile arrest rate for all offenses reached its highest level in the last two decades, but had declined by 23% by 2000.[5] Violent Crime Index arrests for those under 18 have fallen faster than violent crime arrests among other age groups during this time period. Violent crime arrest rates declined for all age groups between 1994 and 2000, but the rates dropped 44% for youths ages 15-17, compared with 24% for adults ages 18-24, 26% for those ages 25-29, and 19% for those ages 30-39.[6] Between 1980-2000, the Violent Crime Index arrest rates for youth ages 15-17 decreased 10% and the rates for adults increased. *Id.* Under juvenile Violent Crime Index arrest figures (which by 2000 dropped 41% from the peak year in 1994), even if each arrest involved a different juvenile (*i.e.*, each juvenile arrested in 2000 was only arrested once), only about one-third of 1% of juveniles ages 10-17 were arrested for a violent crime in 2000.[7] For the year 2000, the juvenile violent crime arrest rate was 309 arrests for every 100,000 persons ages 10-17, the lowest level since 1985. *Id.*

Arrest Rates For Specific Crimes

Arrests of those under 18 for murder and non-negligent manslaughter decreased 55% between 1996 and 2000, and between 1991 and 2000, juvenile arrests for murder decreased by 65%.[8] The juvenile arrest rate for murder peaked in 1993, with around 3,800 arrests nationally.[9] By 2000, the juvenile arrest rate per 100,000 persons fell 74% from this high, with an estimated 1,200 juvenile arrests for murder nationally.[10] In other words, there were over three times as many juvenile arrests nationally for murder in 1993 as there were in 2000. Juvenile robbery arrests shrank 38% between 1996 and 2000, and 29% between 1991 and 2000.[11] Juvenile forcible rape arrests decreased 17% from 1996 to 2000, and 26% from 1991 to 2000. *Id.* Juvenile aggravated assault arrests fell by 14% from 1996 to 2000, and by 7% from 1991 to 2000. *Id.* 25% of all persons arrested for robbery in 2000 were under age 18, substantially higher than the juvenile proportion of arrests in other violent offenses: forcible rape (16%), aggravated assault (14%), and murder (9%).[12]

Endnotes:

1. Federal Bureau of Investigation, "Crime in the United States 2000: Uniform Crime Reports," Section II: Crime Index Offenses Reported, p. 5-6.
2. U.S. Department of Justice, Bureau of Justice Statistics. Based on data from the "National Crime Victimization Survey" and the FBI's "Uniform Crime Reports." Available at www.ojp.usdoj.gov/bjs/
3. Federal Bureau of Investigation, "Crime in the United States 2000: Uniform Crime Reports," Section IV: Persons Arrested, p. 215.
4. Office of Juvenile Justice and Delinquency Prevention, "Statistical Briefing Book," *Juvenile Proportion of Arrests by Offense*, available on-line at: www.ojjdp.ncjrs.org/ojstatbb/index.html.
5. *Id*. at *Juvenile Arrest Rates for All Crimes, 1980-2000*.
6. *Id*. at *Age-specific Violent Crime Index Arrest Rates, 1980, 1994, and 2000.*
7. *Id.* at *Juvenile Arrest Rates for Violent Crime Index Offenses, 1980-2000.*
8. *Id*. at *Estimated Number of Juvenile Arrests, 2000.*
9. *Id.* at *Juvenile Arrest Rates for Murder, 1980-2000.*
10. *Id.* at *Estimated Number of Juvenile Arrests, 2000;* and *Juvenile Arrest Rates for Murder, 1980-2000.*
11. *Id*. at *Estimated Number of Juvenile Arrests, 2000.*
12. *Id*. at *Juvenile Proportion of Arrests by Offense, 2000*.■

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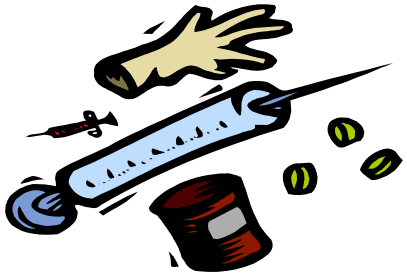

Juvenile Sex Offenders

Gail Robinson

Being designated a juvenile sexual offender is a very serious matter, and any defense attorney whose client is facing that prospect should familiarize himself with the juvenile sex offender statutes and the issues which can be raised on the client's behalf. The relevant law was substantially revised by HB 144 which became effective July 15, 2002, and this article will include those revisions.

1. Who can be Classified as a Juvenile Sexual Offender?

See KRS 635.505- Juvenile sexual offender is an individual who:

- was under age 18 at time of offense
- is NOT actively psychotic
- is NOT mentally retarded: (Mental retardation is now defined as an IQ of 70 or below – *See* KRS 635.505(4))
- has been adjudicated guilty, pled to or been convicted of a sexual offense

2. Which Sex Offenses can Result in a Label of Juvenile Sex Offender?

KRS 635.510 provides that a juvenile "shall" be declared a juvenile sexual offender if he is thirteen years of age or older, and has committed one of the following crimes:

1) Any Chapter 510 felony offense – rape (any degree), sodomy (first, second, or third degree), or sexual abuse first degree.
2) Any other felony committed in conjunction with a misdemeanor described in Chapter 510;
3) Criminal attempt rape first degree or sodomy first degree;
4) Incest;
5) Unlawful transaction with a minor first degree;
6) Use of a minor in a sexual performance.

In addition, the juvenile court "may" declare a juvenile to be sexual offender, even when he doesn't meet these criteria, if the juvenile is either:

1) 12 years old or younger and has been found guilty of one of the offenses listed above, or
2) Any age and has been found guilty of a misdemeanor under KRS chapter 510 (sexual abuse second or third degree, sexual misconduct or indecent exposure.)

3. What is DJJ'S Role?

KRS 635.500(1) provides that DJJ shall operate a program for the treatment of juvenile sexual offenders, referred to in KRS 635.500 to 635.545 as the "program." KRS 635.505(1) defines the "treatment program" as "a continuum of services provided in community and institutional settings designed to provide early intervention and treatment services for juvenile sexual offenders."

4. Juvenile Sexual Offender Assessment - KRS 635.510

KRS 635.510(3) now requires a juvenile sexual offender assessment "upon final adjudication by the juvenile court" **only** for youths who may be declared sex offenders. (any misdemeanor offender or child under 13). It is to be conducted by "the program or by a qualified professional approved by the program." The assessment is to recommend the appropriate course of treatment. Upon receipt of the assessment, the court is to determine whether a child should be declared a juvenile sexual offender.

The assessment is now defined by statute as follows: "an assessment of the child's adolescent social development, medical history, educational history, legal history, family history, substance abuse history, sexual history, treatment history, and recent behaviors, which shall be prepared in order to assist the courts in determining whether the child should be declared a juvenile sexual offender, and to provide information regarding the risk of re-offending and recommendation for treatment."

Note: This statue previously required a "mental health assessment" to be performed by "a qualified mental health professional as defined in KRS 600.020." The Department of Juvenile Justice promoted HB 144 which changed this terminology to "qualified professional" which is not further defined. DJJ has hired primarily "social service clinicians" to perform these assessments and provide the services outlined in KRS 635.500. These clinicians are required to have at least a master's in social work, sociology, psychology or a related field and a year of professional social work experience. A bachelor's degree and two years of professional experience can substitute for the master's degree. They are trained through a program at the University of Louisville - to be discussed later in this article.

5. Disposition of a Juvenile Sexual Offender

KRS 635.515(2) requires DJJ to use the least restrictive alternative as defined in KRS 600.020. Thus, while youth 13 or older found guilty of felony sex offenses must be declared sexual offenders and must be committed to DJJ (*see* KRS 635.515(1)), DJJ can place them in the community for treatment and often does so. The program is required to send written reports to the trial judge every sixty (60) days. KRS 635.515(5). The report shall include information about the treatment received, assessment of the offender's current condition and recommendations by program staff.

KRS 635.515 states that a juvenile declared to be a juvenile sexual offender shall be committed to DJJ and shall receive a maximum of three (3) years of treatment. The maximum age for remaining in DJJ's care is 21. If the offender turns 19 before completing the treatment program or the expiration of 3 years, he is to be re-

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turned to the sentencing court which may order the offender to complete treatment "subject to the contempt powers of the court."

Note: The section of this statute requiring a minimum of two years of sexual offender treatment has been deleted.

The case may be called for review by recommendation of program staff or the judge at any time. KRS 635.515(6). That review may be called to consider documentation of non-compliance, absenteeism or unwillingness to acknowledge responsibility for sexually inappropriate behavior "which may be remedied through the contempt powers of the court."

6. Miscellaneous

An important revision of the Juvenile Code contained in HB 144 is the inclusion of a limited privilege for juvenile sexual offenders comparable to the one provided for adult offenders in KRS 197.440. This new privilege will be contained in KRS 635.500 - 635.545 in a section not yet numbered. The new provision provides that "communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program, between a sexual offender or member of the sexual offender's family and any employee of the department who is assigned to work in the program, or any approved provider, shall be privileged from disclosure unless the sexual offender consents in writing to the disclosure or the communication is related to an ongoing criminal investigation." There are exceptions for communication regarding conduct in which the sexual offender was not a participant or for any disclosure involving a homicide.

DJJ is required to maintain complete data on each offender participating in the program. KRS 635.525. DJJ is also required to maintain files on program participants for fifteen (15) years and to issue a bi-annual report concerning whether participants have committed new crimes. Those reports fortunately indicate few new crimes committed by those who have participated in DJJ's sex offender programs.

7. Special Issues Regarding Youthful Offenders

Youthful offenders present unique issue, since they are subject to the provisions of both adult and juvenile law. Some of the issues to be considered include:

A. Youthful offender/sexual offenders receive the same SOTP program as public offender-sexual offenders while in DJJ programs. *See* KRS 640.030(4) and KRS 197.420.

B. Youthful sexual offenders are subject to the same limitations on probation and parole as adult sexual offenders, including:

1. A youthful offender convicted of a sexual offense enumerated in KRS 532.045 is not eligible for probation or conditional discharge. KRS 532.045 refers to sex crimes involving violence against minors, or the use of a "position of special trust" to facilitate sex crimes against minors.
2. A youthful offender convicted of rape or sodomy in the first degree is a "violent offender" who must serve at least 85% of his sentence before he can be paroled. KRS 439.3401.
3. A youthful offender must complete the sex offender program before he will receive credit for the good time he has earned. KRS 197.045(4), and, if he is an eligible sexual offender, must complete the sex offender program before he is eligible for parole, KRS 439.340(11).
4. Regardless of the length of the youthful offender's sentence, the offender will have three years of conditional discharge added on to the end of his sentence. If the offender violates the terms of the conditional discharge (which are established by the Department of Corrections) then he can have the conditional discharge revoked, and can serve whatever balance remains on the conditional discharge.

C. Youthful offenders are subject to "Megan's Law" requirements (KRS 17.495 – 17.991).

8. Legal Issues Regarding Juvenile Sexual Offenders

A. Age of Perpetrator

Unquestionably, KRS Chapter 510 ("sexual offenses") was not drafted with juveniles as perpetrators in mind. There is no general minimum age for prosecution under KRS Chapter 510. KRS 510.040, first degree rape, and 510.070, first degree sodomy, specify that sexual intercourse/deviate sexual intercourse with someone incapable of consent because he or she is under age 12 is a class A felony. There are no age limitations in the statute for prosecution for rape first degree or sodomy first degree. There are such limits for rape second degree (KRS 510.050 - age 18); rape third degree (KRS 510.060 - age 21); sodomy second degree (KRS 510.080 - age 18); sodomy third degree (KRS 510.090 - age 21). KRS 510.020(3) also specifies that the age of consent is 16. Nonetheless, even children under age 12 are prosecuted for rape first degree and sodomy first degree for sexual conduct with each other. Furthermore, it is not uncommon for a 13 year old who has sexual contact with an 11 year old to be prosecuted for a class A felony.

The Commentary to the statute regards ages 12, 14 and 16 as the critical ages as far as protecting victims. Prosecution of children under 16 and even under 12 for sexual contact with other children produces anomalous and harsh results which may be contrary to the intent of the law. Any lawyer representing a child who is under 16 and being prosecuted for rape in the first degree or sodomy in the first degree based on the victim's being less than 12 years old (but not based on forcible compulsion) should challenge the statute's application to him since he is also deemed statutorily unable to consent. Section 2 of the Kentucky Constitution forbidding arbitrary prosecutions should be cited as should the due process and equal protection guarantees of the 14th Amendment to the United States Constitution. If the client is under 14, the argument is more compelling, and if the client is under 12, it is extremely compelling. *Young v. Commonwealth*, Ky., 968 S.W.2d 670, 672 (1998) supports this position. In *Young*, the Kentucky Supreme Court stated that any sexual contact between Young, an adult, and an eleven year old would have been illegal sexual activity as would sexual contact between two other children under 12 "although neither child could be subjected to prosecution because of their respective ages." *Id*. Additionally, if the client is chronologically 15 years old but low

functioning due to a low IQ or mental illness, urge the court that, in reality, there is no "age difference" between the perpetrator and the victim.

When one reviews the relevant statutes, the problem becomes clear. Since a juvenile cannot be charged with rape second, rape third, sodomy second or sodomy third because those crimes require a minimum age of at least 18, if there has been intercourse or deviate sexual intercourse between a juvenile and a child less than 12 years old, the only apparently relevant statutes are rape in the first degree, sodomy in the first degree and sexual misconduct, KRS 510.140, which criminalizes sexual intercourse or deviate sexual intercourse with another person without the other's consent. Urge the court that the misdemeanor statute, sexual misconduct, is the only even arguably applicable statute.

Counsel should also consider the common law defense of infancy outlined in *Thomas v. Commonwealth*, Ky., 189 S.W.2d, 686 (1945). A child under 7 is conclusively presumed to be incapable of committing a crime. A child age 7 to 14 is presumed incapable but that presumption may be overcome by evidence. Defense counsel must also consider whether a child client may be incompetent to stand trial.

B. Physical Capacity

An important issue to consider is whether your client is physically capable of committing the charged offenses. For rape charges, the issue is fairly straightforward: could a person of your client's age and maturity do what he was accused of?

For sodomy, sexual abuse, and other "deviant" sexual crimes, the issue is more complicated. Acts that would seem sexual in nature if committed by an adult may not be when committed by a young or immature child. For example, many young victims of sexual abuse will mimic acts which had been perpetrated on them. However, whether the act was done for the purpose of sexually gratifying either party is a critical issue with both sodomy and sexual abuse charges. "Deviant sexual intercourse" is defined as an "act of sexual gratification." KRS 510.010(1). "Sexual contact" is defined as act done "for the purpose of gratifying the sexual desire of either party." KRS 510.010(7). In either case, the perpetrator must intend that either he or the victim be sexually gratified by that conduct. Thus, when your client is young, immature, or mentally limited, it may be necessary to seek a pretrial evaluation to determine whether your client was able to commit the charged offenses.

C. Sex Offender Assessments

There are also significant issues when representing juveniles charged with sex offenses about juvenile sex offender assessments and instruments. There are no valid, reliable instruments for assessing the risk that a juvenile who has committed a sex offense will re-offend. Additionally, there are not adequately trained, state certified professionals to perform assessment and treatment of juveniles who have committed sex offenses. This is a problem not only in Kentucky, but throughout the country. What does exist in Kentucky is the "juvenile sexual offender counselor certification program" which is run jointly by the Department of Juvenile Justice and the University of Louisville. Dr. Dana Christensen has been instrumental in developing this program. Individuals who complete the program which begins with an intensive eight day training experience at the University of Louisville and continues with a six month practicum experience, may be certified and will receive a diploma verifying successful completion of the program. Certainly, the intentions of those who developed this program - to provide training for individuals who will counsel juveniles sex offenders - are laudable. However, the certification which is offered is in actuality simply a certification of completion of studies. There is no state certification program and there is no minimum educational requirement for involvement in U of L's certification program, although most individuals who participate do have a bachelors degree. Dr. Christensen has acknowledged that the program alone does not qualify a person to perform sexual offender assessments.

If a client will be facing a juvenile sexual offender assessment, defense counsel may want to request an independent expert pursuant to KRS Chapter 31. Additionally, defense counsel may want to request a *Daubert* hearing concerning the assessment that may be performed on his client by a DJJ professional. There was a session on making such challenges at the June 2001 DPA Seminar and relevant materials can be found on the DPA Intranet at File: //Dpa-16869/handouts/H781.pdf.

9. KCJC's Juvenile Justice Committee's Study

In the fall of 2000, the Juvenile Justice Committee of the Kentucky Criminal Justice Council (KCJC) began a study of juvenile sexual offender issues. The Committee heard presentation from various agencies and individuals such as DJJ, DPA, CFC, prosecutors, service providers and victims advocacy groups. At the conclusion of the study in May 2001, the Committee made a number of recommendations to KCJC which endorsed all of them. Several involved possible statutory revisions to KRS Chapter 635.500, and HB 144 fortunately included most of those revisions. The Committee requested that the Penal Code/ Sentencing Committee address the problems with KRS 510 which result in children being charged with high level felonies because of confusing age thresholds. The Committee expressed concern that Kentucky has insufficient qualified, knowledgeable and trained juvenile sex offender assessment and treatment providers and that there is no state certification process for those providers. The Committee further recommended that a certification process be established and that providers utilize state-of-the-art and science based assessment instruments. These important recommendations have not yet been implemented. ■

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PRACTICE CORNER
LITIGATION TIPS & COMMENTS


Misty Dugger

DOJ Web Site Offers Useful Information For Cross-Examination of Meth Experts

An increasing number of defendants are being charged with possession of chemicals for the manufacture of methamphetamine. In order to challenge the Commonwealth's evidence and witnesses, it is imperative that the defense attorney has an understanding of basic methamphetamine use and production. In "Overview of Meth Use and Production," *for The Defense*, Vol. 9, Issue 2 :5-6, defense attorney Ted Crews encourages other defense attorneys to use the web to gather relevant information of meth use and production in preparation for preliminary hearings and trial cross-examination. "Knowing the intricacies of such processes may allow a defense lawyer to "school" an "expert" narcotics officer who is rattling off a list of chemicals found at the scene without having even the most basic understanding of how such chemicals could be used in the production process."

The U.S. Dept of Justice compass search server is found at http://search.usdoj.gov/compass. This server will direct you quickly to publications, reports, and studies on numerous justice topics, including National Drug Intelligence Center articles. Of particular interest may be the National Drug Intelligence Center's *Kentucky Drug Threat Assessment,* July 2002 report (found at http://www.usdoj.gov/ndic/pubs/1540/meth.htm) and the ***National Drug Threat Assessment 2002,*** December 2001, report found at http://www.usdoj.gov/ndic/pubs/716/meth.htm. These reports included information on methamphetamine abuse, demand, availability, production, and distribution.

~ Misty Dugger, Frankfort Appeals Branch

Watch for Improper Closing Arguments Appealing To Local Sentiment or Prejudice in Drug Cases

Improper argument that appeals to local prejudice or sentiment is prohibited in closing arguments. Yet, without objection the prejudice of these types of argument cannot be corrected on appeal. The prosecutor in *Whisman v. Commonwealth*, Ky.App., 667 S.W.2d 394 (1994), made remarks about drug dealers in the community and the abuse of drugs by children. "While these remarks give a first-blush impression of being improper because there is no factual basis for them in the record, we cannot give any in depth consideration because they were not objected to, so they were ***not preserved for appellate review***." *Id*. at 398 (emphasis added).

~ Adapted from Leo Smith, "Defending Drug Cases" DPA Circuit Court Education Manual (April 2002)

Quantity of Drugs Affects the Penalty Range for Possession of Marijuana, But Not Cocaine Cases

The quantity of drugs recovered from a defendant is always a major factor in determining possession versus trafficking. However, unlike marijuana cases, the quantity in question is not otherwise significant in controlled substance cases.

In marijuana cases, the penalties are different under KRS 218A.1421 for trafficking in marijuana depending upon whether the quantity is less than 8 ounces, 8 ounces or more but less than 5 pounds, or 5 pounds or more. In contrast, the amount of cocaine recovered is not a statutory factor. In *Commonwealth v. Shivley*, Ky., 815 S.W.2d 572 (1991), "A state forensic chemist testified at the hearing that the test tube and pipe contained cocaine. The residue could not be accurately weighed, but it was stipulated that a sufficient amount of the residue remained available for testing." *Id.* The trial court adopted the reasoning of the California Supreme Court and applied "usable quantity" approach. The Supreme Court held that "[n]either statute determines any amount of cocaine which may be possessed legally. Cocaine residue is, in fact, cocaine and we find no argument to the contrary." *Id.* at 573. "[P]ossession of cocaine residue (which is cocaine) is sufficient to entitle the Commonwealth's charge to go to a jury when there is other evidence or the inference that defendant knowingly possessed the controlled substance." *Id.* at 574.

~ Adapted from Leo Smith, "Defending Drug Cases," DPA Circuit Court Education Manual (April 2002)

Always Notify Attorney-General When Challenging the Constitutionality of a Statute

CR 24.03 requires notice not just to the local Commonwealth's Attorney but also to the Attorney General for any constitutional challenge to any statute. The rule states: "When the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney-General." Thus, challenges on appeal may not be allowed if a trial attorney fails to give the requisite notice. The address for the Attorney General is: Hon. A. B. Chandler III, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

~ Misty Dugger, Appeals Branch, Frankfort

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to Mdugger@mail.pa.state.ky.us. ■

6th Circuit Review

Emily Holt

Miller v. Straub* and *Haynes v. Burke
299 F.3d 570 (6th Cir. 8/2/02)

Ineffective Assistance of Counsel in Juvenile Cases Where Trial Attorneys Advise Guilty Pleas and Prosecution Successfully Appeals Imposition of Juvenile Sentences. In these cases the 6th Circuit affirms the district court's granting of writs of habeas corpus to Miller and Haynes on the ground of ineffective assistance of trial counsel. Miller and Haynes plead guilty to first-degree murder and are serving LWOP sentences.

In 1990, Miller was 15 years old and Haynes was 16 years old. On the advice of counsel, each plead guilty to first-degree murder. Counsel advised the 2 boys to plead guilty on the belief that the boys would be sentenced as juveniles. The trial court did so—sentencing them to confinement in juveniles facilities until the age of 21—and the prosecution appealed. The Michigan Supreme Court reversed, and at re-sentencing the boys received the only possible adult sentence—LWOP. Neither Miller nor Haynes had been advised that the prosecution could appeal the juvenile sentences. The federal district court found that this failure constituted ineffective assistance of trial counsel, and the 6th Circuit agrees. The 6th Circuit reaches this decision despite the fact that during the plea hearings in both of these cases—which were before the same judge—the boys were told that it was in the judge's discretion whether he sentenced them as adults or as juveniles. In a plea hearing in Miller's case, the prosecutor stated that if the judge sentenced Miller as a juvenile, the state would appeal.

After the trial court's re-sentencing of Miller and Haynes as adults, the trial court held evidentiary hearings on whether their trial attorneys were ineffective. Haynes testified that his attorney, Rice, never told him the prosecutor could appeal and the appellate court could impose a LWOP sentence. He said if he had been told that, he would not have plead guilty. At Miller's evidentiary hearing, his trial attorney, Lusby, testified and said that all he knew about was trial work, that knew nothing about appeals. He said he convinced Miller and his parents that pleading guilty was in Miller's best interest, despite the fact that Miller was "reluctant" to plea. He said it never occurred to him that the prosecutor would appeal, or that an appellate court would reverse the trial court's sentencing. He said that although he recalled the prosecutor's statement at a hearing that he would appeal, he never thought he would be successful. Miller testified that he was never told the prosecutor could appeal, and if he had been told so he would not have plead guilty. While the trial court granted Miller's and Haynes' motions to withdraw their guilty pleas, the prosecutor appealed and the Michigan Supreme Court reversed, holding that each boy knew when he plead guilty that he could receive an adult sentence.

Under *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel in the guilty plea context must show deficient performance by counsel and prejudice resulting from that deficient performance by proving a "reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. As to counsels' performance in this case, the Court emphasizes the young age of both of these defendants and the real possibility that the prosecution would appeal the imposition of 5 and 6 year sentences of imprisonment (which is what Haynes and Miller received) in first-degree murder cases. A competent attorney would not just weigh going to trial vs. pleading guilty, but was also weigh the possibility of the prosecution appeal of a juvenile sentence.

As to prejudice, both Miller and Haynes stated at the evidentiary hearing that they would not have pleaded guilty if they had known of the possibility of a prosecution appeal. However these "self-serving statements," do not have to be relied upon, as the Court notes that while both Miller and Haynes were aware of the maximum sentence—LWOP— that could be imposed in this case, that knowledge is not equivalent to an awareness that a sentence set by a judge would be appealed.

**See also Lyons v. Jackson*, 299 F.3d 588 (6th Cir. 8/8/02), another August case in which the 6th Circuit grants a petition for writ of habeas corpus because trial counsel was ineffective in not advising Lyons that the prosecution could appeal the trial court's sentencing of Lyons as a juvenile after a plea of guilty to first-degree murder.

Sawyer v. Hofbauer and Stovall
299 F.3d 605 (6th Cir. 8/9/02)

In March, 1991, in Ingham County, Michigan, a 14-year-old boy was kidnapped at gunpoint and forced to engage in oral sex with a stranger who then released him. In May, 1991, in Hillsdale County, Michigan, an 18-year-old female was kidnapped at gunpoint and forced to engage in oral sex with a stranger who then released her. Sawyer was arrested for both incidents. In June, 1992, in Michigan state court, he was convicted of first- and second-degree criminal sexual

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conduct, kidnapping, and 3 counts of possession of a firearm during the commission of a felony in the attack on Ms. Miller. His conviction was affirmed on direct appeal. In November, 1992, Sawyer was convicted by another Michigan jury of kidnapping, first-degree criminal sexual conduct, and possession of a firearm during commission of a felony in the attack on Lundberg. His conviction was affirmed on direct appeal.

Brady Claim Requires New Trial Where Prosecution Failed to Reveal Semen Stain on Rape Victim's Underwear Was Tested and Did Not Belong to Defendant. On habeas review, Sawyer raises a *Brady v. Maryland*, 373 U.S. 83 (1963), claim as to evidence in the Hillsdale County case. A semen stain was found on Miller's underwear. At trial, a laboratory scientist for the Michigan state police, testified that the stain was not tested because it was said to be Miller's boyfriend's. In fact the police had tested the semen stain against Sawyer's blood type and found it to not match. This was not discovered until 2 years after trial when a Freedom of Information Act request was made by defense counsel. A *Brady* claim on these facts was raised on direct appeal, but rejected by the state courts.

The Court first examines Sawyer's claim that whether the district court abused its discretion in denying Sawyer an evidentiary hearing in federal court. Sawyer is entitled to such a hearing if he "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001).

The 6th Circuit notes that, under *Brady*, this evidence is exculpatory so Sawyer has alleged sufficient grounds for release. Miller testified that she wore clean clothes on the day of the attack and immediately gave the close to the police after the attack. She says the perpetrator made her take off her clothes during the attack and returned them to her later. The existence of a semen stain from someone other than Sawyer is also material to Sawyer's guilty or innocence. The evidence against Sawyer was not overwhelming and "it is reasonably probable that the disclosure of a semen stain on Miller's underwear from a source other than Sawyer would have changed the result of Sawyer's trial.

Some facts are in dispute, such as who did deposit the semen but that it is not a relevant issue for this inquiry. It is not disputed that Sawyer did not deposit the semen. An evidentiary hearing would only confirm this, so the Court proceeds to an analysis of the merits of Sawyer's *Brady* claim.

Brady requires that the prosecution reveal evidence that is favorable to the defendant and is material to his guilt or innocence. The fact that the semen stain was not Sawyer's was favorable to Sawyer and material. The Court holds that because of this *Brady* violation Sawyer is entitled to a writ of habeas corpus in the Hillsdale County case.

The Court refuses to grant a writ of habeas corpus in the Ingham County case because Sawyer's claim is that the *Brady* violation in the other case requires relief in this case. However these cases are not connected, and in the Ingham County case there was eyewitness identification.

Judge Boggs' dissents in the granting of the writ in the Hillsdale County case. He believes the state court's adjudication of the claim was not contrary to, or an unreasonable application of, federal law, and was not based on an unreasonable determination of fact.

Hargrove v. Brigano
300 F.3d 717 (6th Cir. 8/14/02)

District Court Can Prospectively Toll Statute of Limitations for Filing of Habeas Petitions. Hargrove filed a petition for writ of habeas corpus before appealing his case to the Ohio Supreme Court. Ohio filed a motion to dismiss, arguing the claim was not exhausted. The district court agreed; however, noting that under Ohio law Hargrove could file a motion for a delayed appeal, it dismissed the petition without prejudice and ordered that the one-year statute of limitations be tolled as long as Hargrove pursued state remedies within 30 days of its order and that he return to federal court within 30 days of exhausting state remedies. Ohio appeals, arguing that the district court erred when it tolled the statute of limitations.

The 6th Circuit notes that, while it is odd for a court to *prospectively* equitably toll the statute of limitations, and that such a decision should normally be made by the court receiving an untimely petition, the district court's action in the case at bar was within its power. This is because the court set appropriate limits upon Hargrove that will not allow any delay, *i.e.* he must pursue his state remedies within 30 days of its order and must return to federal court within 30 days of exhausting state claims. *See also Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001) and *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002).

Scott v. Elo
2002 WL 2030715 (6th Cir. 9/6/02)

18 Minutes of Prosecutor's Closing Argument Missing from Transcript Does Not Warrant New Trial Without Showing of Prejudice. Scott was convicted of first-degree murder and possession of a firearm during the commission of a felony in Michigan state court. He received a LWOP sentence. 18 minutes of the prosecutor's closing argument was found to be missing from the record during state appellate review. It was determined to be irretrievably lost, and so the appellate court directed the trial court to settle the record. A hearing was held. Defense counsel could not remember much, so the trial court had to rely heavily on the prosecutor's notes and memory. The prosecutor said no objections were made during closing argument, and defense counsel did not refute this. Scott's convictions were affirmed on state direct review.

On federal habeas review, Scott argues that failing to transcribe a significant portion of the closing argument denied him due process. He says that the missing portion may conceal an objection to improper comment by the prosecutor. The Court rejects Scott's argument that a retrial is necessary in his case. The Sixth Circuit requires a showing of prejudice because of the missing transcript for habeas relief to be granted. *Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir. 1986). "Although this Court recognizes the difficulty in demonstrating prejudice where the transcripts are missing, petitioner must present something more than gross speculation that the transcripts were requisite to a fair trial." Scott has only shown gross speculation so relief is denied.

Failure to Give Lesser-Included Instruction in Non-Capital Case Not Egregious. The Court also rejects Scott's claim that he was entitled to an involuntary manslaughter instruction at trial. This instruction was not requested at trial, nor would it have been appropriate in this case. Furthermore, in the Sixth Circuit, in a noncapital case, failure to give a lesser-included instruction is not "such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990).

No Ineffective Assistance of Counsel Where Attorney Elicits Testimony About Earlier Fights Between Client and Victim. Finally while it may have been unwise for defense counsel to cross-examine a witness about a prior fight between Scott and the victim and an incident where Scott shot in the direction of the victim, there was sufficient evidence other than this testimony to support a first-degree murder conviction so Scott was not denied a fair trial.

Marcum v. Lazaroff
301 F.3d 480 (6th Cir. 8/23/02)

AEDPA Statute of Limitations Runs from Deadline for Filing Direct Appeal. Marcum plead guilty in Ohio state court in 1991 to attempted complicity to aggravated burglary. On May 11, 1999, he filed a petition for writ of habeas corpus. The district court denied, holding that direct review ended in 1992 when time expired for the filing of a direct appeal to the Ohio Supreme Court. Marcum argues that direct review ended six years later when the Ohio Supreme Court denied a 1998 motion for belated appeal. The 6th Circuit rejects this argument. The Court refuses to consider Marcum's argument that the statute of limitations was tolled by during a 45-day period following the denial of his 4th state post-conviction petition, during which Marcum could have appealed to the Ohio Supreme Court because even if time was tolled for those 45 days the petition would still be time-barred.

Cobas v. Burgess
2002 WL 31119455 (6th Cir. 9/26/02)

Language Barrier as Basis for Equitable Tolling: Petitioner Must Have Been Prevented from Accessing Courts in the Past. Cobas concedes his habeas petition is time-barred, but argues that the statute of limitations should be equitably tolled because he was born and raised in Cuba and cannot understand, read, or write the English language. The Court holds "that where a petitioner's alleged lack of proficiency in English has not prevented the petitioner from accessing the courts, that lack of proficiency is insufficient to justify an equitable tolling of the statute of limitations. An inability to speak, write and/or understand English, in and of itself, does not automatically give a petitioner reasonable cause for failing to know the legal requirements for filing his claims."

In the instant case, in the record is a letter to an attorney in 1993, 2 post-conviction motions in the state courts, and the current petition. Even if someone helped him do this work, he apparently could communicate with that person. The Court denies the motion for equitable tolling.

Miller v. Collins
2002 WL 31119151 (6th Cir. 9/26/02)

In this case, the 6th Circuit provides further guidance on the AEDPA one-year statute of limitations and determines Miller timely filed his petition for writ of habeas corpus. As the Court notes, this case involves a "complex procedural history.":

September 9, 1995	conviction in Ohio state court of robbery and grand theft
May 17, 1996	Ohio Court of Appeals affirms; no appeal to Ohio Supreme Court
July 10, 1996	moves to file a delayed appeal to the Ohio Supreme Court & the Court allows a delayed appeal
August 13, 1996	seeks to reopen his appeal in Ohio Court of Appeals on ineffective assistance of appellate counsel (Rule 26(b) motion)
November 26, 1996	Ohio Court of Appeals denies Rule 26(b) motion to reopen appeal on appellate IAC as barred by *res judicata*; Miller says he did not get a copy of the Order until May 1997
January 15, 1997	Ohio Supreme Court dismisses Miller's delayed appeal
May 7, 1997	files Motion to Proceed to Judgment as Miller says he never received Order on his 8/13/96 motion in the Ohio Court of Appeals
May 14, 1997	Miller receives letter with 11/26/96 Ohio Court of Appeals order
June 2, 1997	Miller files a Motion for Relief from Judgment in Ohio Court of Appeals
June 30, 1997	Ohio Court of Appeals denies 6/2/97 motion; Miller timely appeals to Ohio Supreme Court

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October 29, 1997	Ohio Supreme Court denies appeal from 6/30/97 Ohio Court of Appeals order
November 19, 1997	files an Application of Delayed Reconsideration in Instanter Pursuant to App. R. 26 and App. R. 14(B) in Ohio Court of Appeals; Ohio Court of Appeals rejects this as a second motion to reopen his appeal
August 26, 1998	Ohio Supreme Court affirms Ohio Court of Appeals rejection of 11/19/97 motion
September 22, 1998	Miller claims he submitted habeas petition to prison officials
November 30, 1998	Prison officials file habeas petition

Miller's conviction became final on July 1, 1996. Thus, AEDPA's one-year statute of limitations began to run on July 2, 1996.

Motion to Reopen Appeal Because of Ineffective Assistant of Appellate Counsel Only Tolls Statute of Limitations. The Court first finds that Miller's Rule 26(b) motion to reopen his direct appeal because of ineffective assistance of appellate counsel (filed August 13, 1996) tolled the statute of limitations. While *Bronaugh v. Ohio*, 235 F.3d 280, 286 (6th Cir. 2000), did hold that a properly filed Rule 26(b) application was part of the direct review process, it only operates to toll the statute of limitations, *i.e.* it does not postpone the running of the statute of limitations. Thus, the Court concludes that since time began to run on July 2, 1996, and on July 10, 1996, Miller filed his application for delayed appeal (while tolls then running of the statute of limitations as well) and it was denied on January 15, 1997, as of that date Miller had only used 8 days of the one-year limitation period.

Court Equitably Tolls Period Where Petitioner Had No Knowledge a Motion for Delayed Appeal Had Been Denied. Miller argues that the time from November 26, 1996, when the Ohio Court of Appeals denied his Rule 26(b) application, until May 14, 1997, when he received word of its denial, should be equitably tolled. The 6th Circuit applies the *Dunlap v. U.S.*, 250 F.3d 1001, 1007 (6th Cir. 2001), test to the case at bar. The Court accepts, as a matter of fact, that Miller really did not receive the November order and thus had no notice. Miller acted diligently to protect his rights before and after receiving notice, by first filing a motion to proceed to judgment, and then after receiving notice, within 3 weeks filing a motion for relief from judgment, and then after that rejection, timely petitioning the Supreme Court for review. Finally, the state of Ohio has failed to show how it would be prejudiced by equitable tolling. The Court thus equitably tolls the period from November 26, 1996, until May 14, 1997.

Court Tolls Period of Time Because State's Failure to Address Issue in Brief Waived Any Argument Against Tolling. Finally, the 6th Circuit holds that Miller's June 2, 1997, motion for relief from judgment tolled the statue of limitations while it was being considered in the Court of Appeals and then in the Supreme Court. It was denied October 29, 1997. The Court holds that this period of time was tolled because the state waived any argument that it did not toll the statute of limitations when it failed to address this in its brief. In between the time that equitable tolling ended, on May 14, 1997, until the time of the June 2, 1997, motion, 18 days ran. Thus as of October 29, 1997, Miller had used 26 days. 327 days elapsed between October 30, 1997, and the day Miller tendered his petition to prison officials, September 22, 1998. Therefore, Miller expended 353 days before filing his petition, and it was thus timely filed for purposes of the AEDPA.

Other important 6th Circuit cases:

- *U.S. v. Burns*, 298 F.3d 523 (6th Cir. 7/29/02): While not finding it to be an abuse of discretion, the 6th Circuit looks with some disfavor at the trial court's allowing of a prosecutor to use a power-point presentation showing fistfuls of cash and large amounts of crack cocaine during opening statement.
- *U.S. v. Stevens*, 2002 WL 1988210 (6th Cir. 8/29/02): This case includes a discussion on the prosecution's use of other crimes evidence at trial. The 6th Circuit found no error where the trial court allowed evidence of prior fires in which Stevens collected insurance proceeds in a trial for arson.
- *U.S. v. Modena*, 2002 WL 31005892 (6th Cir. 9/9/02): The Court holds that there was no plain error where the trial court allowed testimony regarding convictions of co-conspirators. The Court does note that the admission of such evidence is erroneous but refuses to reverse as there was no objection at trial. Finally, the 6th Circuit also takes the prosecutor to task where there was improper vouching of a government witness and pressure on the jury to return a guilty verdict. As there was no objection, the plain error standard applies and the Court refuses to grant Modena relief.
- *U.S. v. Copeland*, 2002 WL 31010969 (6th Cir. 9/10/02): The 6th Circuit again considers 404(b) evidence in the context of admission of 3 prior arrests for possession of drugs in a drug conspiracy case, as well as the admission of testimony that the defendants planned to pay someone $500 to "get" the Assistant U.S. Attorney. The Court determines that the trial court abused its discretion in the admission of the latter evidence, but denies relief because of no objection at trial. ■

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KENTUCKY CASELAW REVIEW

Euva Hess

Commonwealth v. Shake v. Stephenson,
—S.W.3d —, 2001-SC-447
(August 22, 2002)
(Reversing and Remanding)

Double Jeopardy does not prohibit prosecutions in Indiana and Kentucky where criminal acts which are part of a course of conduct occur in both states. Stephenson sought a writ of prohibition from the Court of Appeals to prevent the Jefferson Circuit Court from proceeding with the charges against him. The Commonwealth indicted Stephenson for fleeing and evading, DUI 4th, and driving on suspended license. The charges arose out of an incident in 1999. A Jefferson County officer attempted to stop Stephenson for speeding. Stephenson fled into Indiana where he was eventually stopped by Indiana and Kentucky officers. Stephenson appeared to be DUI. He pled guilty to OWI – a D felony in Indiana – he received a fine, suspended sentence, and 2 years probation. The Kentucky indictment followed this plea. In August 1999, pursuant to a plea agreement with the Commonwealth, the Jefferson District Court dismissed the charges against Stephenson. In September, the Commonwealth re-indicted.

In the writ and on appeal, Stephenson argued double jeopardy barred the charges because he pled guilty in Indiana for charges based on the same conduct; Kentucky assisted in the Indiana prosecution by supervising his probation and revoking his license, and the district court's dismissal barred subsequent indictment. The Court of Appeals granted the writ. The Supreme Court reversed.

The Supreme Court reiterated that a defendant who faces prosecution barred by double jeopardy may take a writ in the next court even though a direct appeal would provide an avenue of relief. However, the Supreme Court did not agree that double jeopardy barred this prosecution.

The Court held that Kentucky seeks to punish Stephenson for that portion of his crime which occurred in this state. The fact that Stephenson successfully crossed the state line does not prevent Kentucky from pursuing charges against him. *Citing Heath v. Alabama*, 474 US 82 (1985) (dual sovereignty); KRS 505.050, and *Hash v. Commonwealth*.

In furtherance of the Indiana prosecution, Kentucky police officers helped with the stop; Kentucky Department of Motor Vehicles suspended his license, and Kentucky Probation and Parole supervised his release. The Court found that Kentucky's assistance did not constitute punishment that would bar further prosecution.

The district court cannot dismiss felony charges. The Court held that the district court's dismissal of the charges was insufficient to operate as res judicata under KRS 505.030 because the district court did not have jurisdiction to make a final adjudication of felony charges.

Hughes v. Commonwealth ,
— S.W.3d, 2000-SC-156-MR
(August 22, 2002)
(Affirming)

Hughes appealed his 40 year sentence based on a conditional guilty plea to murder. Hughes's wife's body was recovered in their apartment. The Commonwealth charged Hughes with her murder. The Court upheld the warrantless entry into the apartment because the officer had a reasonable belief that the victim needed assistance. In dicta, the Supreme Court held that the warrantless entry of the apartment could also be justified under "inevitable discovery."

Violent offenders under the 1998 version of KRS 439.3401 are eligible for parole at 85% or 12 years, whichever is less. The Supreme Court readopted its ruling in *Sanders v. Commonwealth*, Ky., 844 S.W.2d 381 (1992). Thus, violent offenders under the 1998 version of KRS 439.3401 are eligible for parole after serving either 85% of their sentence or 12 years, whichever is less. The Court held that the legislature adopted this construction of the 1998 statute because it was aware of this interpretation of the older statute and yet substantially re-enacted the old statute.

Maxie v. Commonwealth,
—S.W.3d — , 2001-SC-636-MR
(August 22, 2002)
(Affirming)

Maxie appealed his twenty year sentence for trafficking in a controlled substance, possession of drug paraphernalia, and PFO 2nd.

The Commonwealth's failure to present direct evidence of the defendant's age during the PFO phase was harmless error. The jury had before it the defendant's date of birth and the date the prior offense was committed. The jury could have done "simple subtraction" to determine the defendant's age at the time of the offense. "Such reasonable inferences are no longer prohibited in Kentucky when a jury must decide whether a defendant is a PFO." *Citing Martin v. Commonwealth*, Ky., 13 sw3d 232 (2000).

Admission of an indictment from a prior offense during PFO was not error. Rather, it was a "general description" of the crime admissible under 532.055(3), and *Robinson v. Commonwealth*, Ky. App., 572 S.W.2d 657 (1978).

Myers v. Commonwealth,
—S.W.3d —, 2000-SC-407-DG
(August 22, 2002)
(Reversing and Remanding)

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Myers appealed his twelve year sentence for manslaughter first. The Court of Appeals affirmed the conviction. The Supreme Court granted discretionary review.

Myers was indicted with a co-defendant. The co-defendant was evaluated at KCPC by three different doctors. All doctors noted his limited mental capacity and difficulty recalling events or things he said "five minutes ago." At the subsequent hearing, the court found him competent. He later entered a guilty plea, a condition of which was to testify against Myers. Defense counsel sought to impeach his testimony with information contained in the KCPC report and statements he made to KCPC evaluators.

KCPC evaluations and statements made during the course of, may be used to impeach a witness at trial. The Supreme Court held that such evidence was admissible because the professional confidential relationship does not exist in a court-ordered evaluation. Moreover, KRE 507 (c)(2) does not limit "the scope of the exception to the particular purpose for which the examination was ordered but admits statements made during the course of the examination 'on issues involving the patient's mental condition.' The credibility of a witness testifying to relevant evidence is always at issue." Thus, evidence of mental incapacity is especially relevant to the witness's credibility.

Perdue v. Commonwealth
— S.W.3d —-, 1999-SC-1092-MR
(August 22, 2002)
(Affirming)

Although the defendant has a right to speedy re-sentencing, in a post conviction setting, the defendant must show prejudice. The Court held that a 54 month delay following the reversal and remand of Perdue's sentence for a new sentencing hearing did not violate his right to a speedy sentence or violate RCr 11.02. The Court recognized that the Sixth Amendment includes the right to speedy sentencing along with the right to a speedy trial. The Court found the speedy trial factors (length of delay, reason for delay, defendant's assertion of right to speedy trial, and prejudice) enunciated in *Barker v. Wingo* controlling. However, in balancing those factors, the Court held "in a post-conviction situation, the showing of prejudice dominates …."

Impairment of the right to appeal could in some circumstances be sufficient prejudice. However, this denial of due process typically impairs appeals as a matter of right. In an appeal from a sentencing matter the Court examines the procedure used to impose that sentence. Impairment of the right to collaterally attack a conviction could be sufficient prejudice. However, "whether a defendant is prejudiced [by such impairment] rests with the merits of the proposed collateral attack itself."

Prater v. Commonwealth
— S.W.3d—, 2000-SC-0279-DG
(August 22, 2002)
(Affirming)

Pre-release probation violates separation of powers. The Supreme Court held that KRS 439.575, the pre-release probation statute, violates separation of powers because it delegates the executive power of parole to the judiciary. Thus, the statute is unconstitutional.

The Court did not find the pre-release probation statute analogous to shock probation. (The Court found shock probation constitutional in *Williamson v. Commonwealth*). Because the pre-release statute does not limit the court's jurisdiction and ability to impose probation, pre-release is more akin to parole. Moreover, the Court held that that participation by the executive branch through eligibility determinations and recommendations did not overcome the separation of powers violation.

Shadowen v. Commonwealth,
— S.W.3d—, 2000-SC-681-DG
(August 22, 2002)
(Reversing)

Intermediate Saturdays, Sundays, and legal holidays must be excluded from the computation of time allowed to file a motion for a new trial. The Supreme Court held that the five day period in RCr. 10.06 (time for filing motion for a new trial) is within the seven day exception in RCr 1.10. The Court overruled *Byrd v. Commonwealth*, Ky., 825 SW2d 272 (1992).

Commonwealth v. Henderson,
——S.W.3d —, 2000-SC-233-DG
(September 26, 2002)
(Reversing)

The Commonwealth appealed the Court of Appeals opinion reversing Henderson's convictions for Tampering with Physical Evidence and Persistent Felony Offender, First. The Supreme Court granted discretionary review and reversed the Court of Appeals.

A defendant can tamper with physical evidence by hiding the evidence on his person. Tampering with Physical Evidence requires an intent to "disrupt the investigatory process." The Supreme Court held that a defendant can commit Tampering with Physical Evidence by hiding the fruits of crime on his person. In these types of cases, the type of evidence and the place where it is hidden is relevant. "A conventional place may become an unconventional place if the police are chasing the suspect when it is hidden." Thus, putting money in your shoe can be tampering with physical evidence if the police are chasing you.

Hiding evidence for the purpose of shoplifting is not Tampering with Physical Evidence. The Court made clear that this opinion does not now turn misdemeanor shoplifting cases into Tampering. "Tampering does not arise by the mere act of hiding property on one's person to avoid detection of shoplifting." Rather, "the concealment must be for the purpose of preventing the evidence from being used in an official proceeding."

Stumbo dissented opining that concealment of an item on a defendant's person did not constitute Tampering with Physical Evidence because the defendant was not trying to separate himself from the evidence. The money was in the defendant's possession when he was arrested; therefore, by putting it in his shoe, he did not prevent the evidence from being used in an official proceeding.

Commonwealth v. Plowman,
—S.W.3d—, 2001-SC-478
(9/26/02)
(Reversing)

Bulldozers are vehicles within the meaning of the arson statutes. The Supreme Court reversed the Court of Appeals ruling that a bulldozer is not a vehicle for purposes of KRS 513.010, the arson statute. The Court noted that the 1982 amendments to the statute added the language "or other structure or vehicle" to the definition of building. Thus, according to the Supreme Court, the legislature intended an expansive view and application of the statutes. Therefore, a bulldozer is a vehicle within the definition of a building under KRS 513.010 for the purposes of the arson statutes.

Cooper, Keller, and Stumbo dissent. In his dissent, Keller "subscribe[d] to the less-than-radical notion that a bulldozer is not a 'building.'" Because bulldozers perform functions other than the transportation of people, it is not a "vehicle" within the definition of a "building" under the arson statute.

Holbrooks v. Commonwealth
—S.W.3d—, 1997-SC-1005-MR
(9/26/02)
(Reversing and Remanding)

Holbrooks lied about his name on an Affidavit of Indigency used in conjunction with other criminal charges. Subsequently, the Commonwealth indicted him for first-degree perjury. At the first trial, the jury found Holbrooks guilty of second degree perjury, a misdemeanor, but could not agree on a sentence. The trial court threw out the verdict and dismissed the jury. Three months later, the court granted the Commonwealth's motion for a mistrial. At the second trial, the Commonwealth again sought a first degree perjury conviction.

The jury's ability to agree on guilt or innocence, but failure to agree on a penalty implicates double jeopardy in subsequent prosecution on the same charges. The Supreme Court held that the second trial constituted double jeopardy. In this case, the jury submitted to the court a written finding which was not attached to the instructions. The jury was instructed on second degree perjury but did not fill out the jury verdict form because they couldn't agree on a sentence. Rather, the jury sent "a note" to the judge that stated they found the defendant guilty of second degree perjury but hung on a sentence and asked the judge to impose sentence. The Court found this a sufficient and complete verdict even though the writing did not comply with certain formalities under the criminal rules. The trial court erred by allowing the second jury to re-consider guilt on first degree perjury.

Misrepresentation of name on an affidavit of indigency can subject a defendant to perjury charges. However, the Supreme Court did not find Holbrook entitled to a directed verdict on either perjury charge. The Court held that misrepresentation of one's name, even on an affidavit of indigency, was a material false statement under the perjury statutes because it was a misrepresentation that could affect the outcome of the proceedings. Moreover, the Court held that perjury instructions need not require the jury to find the defendant's false statement was material. "Whether a falsification is material in a given factual situation is a question of law."

Wintersheimer dissented arguing that the signing, under oath, of an affidavit of indigency constitutes an official proceeding and the defendant is guilty of first degree perjury.

Lawson v. Commonwealth,
—S.W.3d—, 2000-SC-24
(September 26, 2002)
(Affirming in Part and Reversing and Remanding in Part)

Lawson appealed his 20 year sentence based on convictions for First Degree Fleeing and Evading, Felony Receiving Stolen Property, and First Degree PFO. The jury had recommended a 24 year sentence (12.6 on each count to run consecutively). At sentencing, the court amended the judgment per KRS 532.110(1)(c) to two 10 year sentences to run consecutively. During the penalty phase, the jury erroneously believed that the defendant's potential penalty ranged from 10-40 years.

A defendant is entitled to a concurrent/consecutive recommendation by the jury. On appeal, Lawson argued that the trial court's amendment of the verdict did not accurately reflect the intent of the jury. The trial court's sentence amounted to the maximum penalty. Although the jury was erroneous in their belief concerning the maximum penalty, their sentence represented something less than the maximum but more than the minimum. The Supreme Court held that because improper information was given to the jury regarding the maximum sentence it could set, due process entitled the defendant to a new sentencing phase "at which the jury will recommend only whether the ten (10) year sentences for Appellant's two convictions should run" concurrently or consecutively.

Roark v. Commonwealth,
— S.W.3d —, 2000-SC-87-MR & 2000-SC-88-MR
(September 26, 2002)
(Affirming)

Roark appealed his two concurrent life sentences based on convictions for Robbery, first, Burglary, second and Sexual Abuse, first. The case arose out of two incidents with the same victim – one in November and one in December. Each time, the intruder entered the victim's home and took money

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or jewelry from the bedroom. During the December incident, the intruder sexually assaulted the victim with his hand.

Identifications enhanced by hypnotism are not per se inadmissible. The trial court should apply a balancing test. During the investigation of this case, at the time when the victim was unable to identify her assailant from the photo arrays, the victim voluntarily underwent hypnosis by a family friend. The hypnotist was not a psychiatrist or psychologist and was not licensed to do forensic hypnotism. As a result of the hypnotism, the victim "recalled" that the assailant was bald and had facial hair. She had not described the assailant this way prior to the hypnosis. On appeal, Roark argued that the trial court erred by admitting an identification that was the product of hypnosis.

The Supreme Court adopted the "totality of the circumstances" approach to hypnosis evidence. That is, the court should determine admissibility on a case by case basis considering the following factors: (1) whether the purpose of the hypnosis was therapeutic or investigative, the latter tending to indicate pressure on the subject to remember; (2) whether procedural safeguards were employed with respect to the hypnotic session; (3)whether independent corroborating evidence exists to substantiate the witness's refreshed recollection; (4) whether the witness's post hypnotic recollection was substantially the same as the witness's prehypnotic recollection as actually related, and (5) the likelihood that the witness's memory has been tainted by outside influences.

Although the court found the hypnosis in this case was (1)for investigative purposes; (2) had no procedural safeguards, and (3) the witness's post hypnotic recollection was not substantially the same as the prehypnotic recollection, because there was little likelihood the memory had been tainted by outside influences and there was significant independent corroborating evidence, the trial court did not err in admitting the identification.

***Rogers v. Commonwealth*,**
—S.W.3d —, 1997-SC-851-MR
(September 26, 2002)
(Reversing and Remanding)

Rogers appealed his 30 year sentence based on convictions for Murder, First Degree, Robbery, and First Degree Burglary. The Commonwealth alleged that Rogers and three others broke into the victim's home, beat him with a tire iron, and robbed him. The victim died from his injuries. Rogers is mentally retarded and was 18 at the time of the incident. During the investigation, Rogers voluntarily went with the officers to the police station. The officers gave him polygraph examinations and told him that he failed because he lied. At some point, Rogers broke down and confessed to the crime. The officers videotaped the confession.

Officers do not coerce confessions by telling the defendant he failed a lie detector test. Even though the results of polygraphs are inadmissible per se, the defendant is entitled to introduce the circumstances surrounding the polygraph in order to explain why he may have given a false confession. On appeal, Rogers argued that the trial court erred by failing to suppress his confession because it was involuntary and taken in violation of his due process rights. The Supreme Court held that the trial court properly admitted the videotaped confession but erred by refusing to allow Dr. Peck, a mental health expert, to testify that mentally retarded people can be coerced into falsely confessing. The Court held that the officers did not coerce the confession by simply telling Rogers he had failed his polygraph. However, the Court emphasized that under *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), a defendant's right to present a meaningful defense includes the right to present evidence regarding the credibility of his or her confession. Although the court did not find the use of the polygraph or police tactics coercive for due process purposes, the Court found these circumstances relevant to the defendant's ability to explain why he confessed. Although there is a general rule that results of polygraph examination are not admissible at trial, the defendant's right to present a defense trumps this rule. Thus, "a defendant – and only the defendant-has the right, as a matter of trial strategy, to bring evidence of polygraph examination before the jury to inform the jury as to the circumstances in which the confession was made."

Moreover, the Supreme Court held that, on remand, the trial court should hold an evidentiary hearing concerning the extent to which Dr. Pack could testify concerning the likelihood of a mentally retarded person to confess in certain situations. The trial court previously excluded this testimony by Pack relying on the "ultimate issue" prohibition. The trial court's ruling pre-dated *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997). The Supreme Court pointed the trial court to *Stringer* for further reference on re-trial.

Even if the evidence that the defendant was so drunk he did not know what he was doing come from the defense, the court should instruct on voluntary intoxication. The Supreme Court held that the trial court erred by failing to instruct on voluntary intoxication. Voluntary intoxication instructions are merited when there is evidence that the defendant was so drunk that he did not know what he was doing or when the intoxication negative the existence of an element of the offense. Given the number of times Rogers stated to the officers and in his confession that he was "really drunk" and "didn't know what he was doing," the jury could have reasonably believed his intoxication impaired his ability to form intent. ■

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Shelton and *Fraser* Impact On Right To Counsel

Two cases have come down over the past year that has had a significant impact on the right to counsel. The United States Supreme Court in *Alabama v. Shelton*, 122 S.Ct. 1764 (2002) strongly supports the right to counsel in state proceedings. In contrast, the Kentucky Supreme Court in *Fraser v. Commonwealth*, Ky., 59 S.W.3d 448 (2001), diminishes the right to counsel in post-conviction proceedings. Each of these is a significant case of which defenders and judges in Kentucky need to be aware.

Alabama v. Shelton, 122 S.Ct. 1764, 152 L.Ed 2d 888

In a 5-4 decision written by Justice Ginsburg, the Court has issued a stunning reaffirmation of the right to counsel in criminal cases. The question presented was simple: "whether the Sixth Amendment right to appointed counsel, as delineated in *Argersinger* and *Scott*, applies to a defendant" given a conditional or suspended sentenced. The Court held that it does.

The Court reviewed the major right to counsel cases. "In *Gideon v. Wainwright*, 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed 2d 799 (1963), we held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1983), applies to state criminal prosecutions through the Fourteenth Amendment. We clarified the scope of that right in *Argersinger*, holding that an indigent defendant must be offered counsel in any misdemeanor case' that actually leads to imprisonment.'…Seven Terms later, *Scott* confirmed *Argersinger's* 'delimit[ation],'" 440 U.S., at 373, 99 S. Ct. 1158. Although the governing statute in *Scott* authorized a jail sentence of up to one year…we held that the defendant had no right to state-appointed counsel because the sole sentence actually imposed on him was a $50 fine."

The Court in *Shelton* reaffirmed the *Argersinger/Scott* "actual imprisonment" rule. *Scott* held that there was no right to counsel because a $50 fine was imposed. (Note that in Kentucky, House Bill 487 recently amended Chapter 31 to eliminate the right to counsel in fine-only cases). However, in *Shelton*, no fine was involved. Rather, what was involved was a suspended sentence that could result in imprisonment upon revocation. "Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? We conclude that it does not. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense."

The Court rejected the notion that the right to counsel should be confined to the situation where imprisonment is immediate rather than potential. This possibility was presented by *amicus*, relying upon *Nichols v. United States*, 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994) and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). The Court rejected this offer, saying that *Gagnon* and *Nichols* "simply highlight that the Sixth Amendment inquiry trains on the stage of the proceedings corresponding to Shelton's Circuit Court trial, where his guilt was adjudicated, eligibility for imprisonment established, and prison sentence determined."

The Court also rejected the predictions of doom from the dissent and *amicus*. *Amicus* had suggested that counsel be appointed only upon revocation to avoid the cost of providing counsel in all misdemeanor cases. The Court noted that the majority of states, like Kentucky, already provide for counsel under similar circumstances. Further, the Court suggested that if a state has insufficient resources, they can utilize pretrial diversion or probation, and provide counsel at the adjudicatory stage once the person placed on pretrial diversion fails and is brought back to be prosecuted.

The four dissenters, led by Justice Scalia, criticized the majority for abandoning the actual imprisonment rule of *Argersinger*/*Scott* while seeming to affirm it. "We are asked to decide whether 'imposition of a suspended or conditional sentence in a misdemeanor case invoke[s] a defendant's Sixth Amendment right to counsel.'..Since *imposition* of a suspended sentence does not deprive a defendant of his personal liberty, the answer to *that question* is plainly no."

The dissent summarized the majority position perhaps with more clarity than did the majority. "Appointed counsel must henceforth be offered before *any* defendant can be awarded a suspended sentence, no matter how short." The dissent also minimized unfortunately the importance of misdemeanor cases. "That burden consists not only of the cost of providing state-paid counsel in cases of such insignificance that even financially prosperous defendants sometimes forgo the expense of hired counsel; but also the cost of enabling courts and prosecutors to respond to the 'over-lawyering' of minor cases."

This is an exceptionally important case for all public defenders. It should be seen as the successor to *Gideon* and *Argersinger*. In it the highest court in the land reaffirmed that indigent defendants facing even the slightest deprivation of personal liberty must be accorded the right to court-appointed counsel. That is important even in Kentucky, where our statute and rule are consistent with the rule announced in *Shelton*. See KRS 31.100(3)(a) & (4)(b); RCr 3.05(2). If Courts in Kentucky have been declining to appoint because of their

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belief that they need not due to their intent to grant probation, then *Shelton* should end that practice. The Court emphasized that at the core of the right to counsel is the need for reliability. Without counsel, we as a society cannot be assured that the verdict, the judgment, the defendant's decision are reliable. Because of the ever-increasing use of enhancements, and the use of minor convictions in sentencing and penalty phases, the *Shelton* decision is the right one.

Fraser v. Commonwealth,
59 S.W.3d 448(2001)

While the *Shelton* decision looked at the front-end of the criminal justice system, *Fraser v. Commonwealth* looked at the back end, the post-conviction stage where the conviction is being attacked. Fraser had entered a guilty plea and given a life sentence in a robbery-murder case. He later filed a *pro se* motion pursuant to RCr 11.42. The Court of Appeals affirmed the decision of the lower court denying the motion without a hearing or appointment of counsel. The Supreme Court granted a motion for discretionary review to examine three issues: "(1) when is an evidentiary hearing required on an RCr 11.42 motion? (2) When is an indigent movant entitled to the appointment of counsel to assist him in pursuing an RCr 11.42 motion? And (3) Was Appellant entitled to an evidentiary hearing and to appointment of counsel in this case?"

In an opinion written by Justice Cooper, the Court, like *Shelton,* began with the fundamentals. The Court reminded us that the Constitution required "indigent defendants be represented by counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and on a first appeal as a matter of right. *Douglas v. California*, 372 U.s. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). There is no constitutional right to a post-conviction collateral attack on a criminal conviction or to be represented by counsel at such a proceeding where it exists. *Murray v. Giarratano*, 492 U.S. 1, 8, 109 S. Ct. 2756, 2769, 106 L. Ed. 2d 1 (1989)."

The Court next traced the development of the right to pursue post-conviction remedies in Kentucky. RCr 11.42 was generated by a committee established by the General Assembly to recommend changes to the Criminal Code. It was modeled on 28 U.S.C. # 2255. While the rule was passed by the General Assembly said nothing about the appointment of counsel, the Court rejected that version and replaced it with one which provided the language for the appointment of counsel as presently found in RCr 11.42(5).

The Court next carefully delineated that which is required by the rule. "After the answer is filed, the trial judge shall determine whether the allegations in the motion can be resolved on the face of the record, in which event an evidentiary hearing is not required. A hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record…The trial judge may not simply disbelieve factual allegations in the absence of evidence in the record refuting them."

Counsel is required if "an evidentiary hearing is required…if he/she is indigent and specifically requests such appointment in writing…If the movant does not request appointment of counsel, the trial judge has no duty to do so *sua sponte*." If no evidentiary hearing is required, "counsel need not be appointed, 'because appointed counsel would [be] confined to the record.'" The Court recognized that the trial court may appoint counsel even where no evidentiary hearing is to be held.

The Court next explored the relation of Chapter 31 to RCr 11.42. The Court noted that the Department of Public Advocacy was created during the pendency of *Bradshaw v. Ball*, Ky., 487 S.W.2d 294 (1972). Chapter 31.110(2)(c) contained a provision granting to a needy person the right to be "represented in any other post-conviction proceeding that the attorney and the needy person considers [sic] appropriate. However, if the counsel appointed in such post-conviction remedy, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense, there shall be no further right to be represented by counsel under the provisions of this chapter."

The Court noted that in *Commonwealth v. Ivey*, Ky., 599 S.W.2d 456 (1980), the Court had required the appointment of counsel "'upon request' of an indigent movant." The Court then proceeded to overrule *Ivey* to the extent that it "holds that KRS 31.110(2)© establishes when a judge must appoint counsel for an indigent movant."

In examining RCr 11.42 as it relates to KRS 31.110(2)©, the Court relied upon the separation of powers. "The responsibility for determining when and whether counsel must be appointed for a criminal defendant in Kentucky is a function of the judicial department, not the legislature. Ky. Const. #116; *see* RCr 3.05(2). To its credit, the General Assembly has created and funded the DPA, and nothing except legislative parameters precludes that office from providing legal services to indigent defendants or movants even when not constitutionally required. We conclude, therefore, that RCr 11.42(5) establishes when a judge *must* appoint counsel for an indigent movant and that KRS 31.110(2)© establishes when the DPA *may* provide legal services even without judicial appointment. To the extent that *Commonwealth v. Ivey*, *supra*, holds that KRS 31.110(2)© establishes when a judge must appoint counsel for an indigent movant, it is overruled."

Justice Cooper also addressed the dissenter's suggestion that *Pillersdorf v. Department of Public Advocacy*, Ky., 890 S.W.2d 616 (1994) placed the appointing decision in the Executive Branch. "*Pillersdorf* only holds that once the DPA has been appointed to represent an indigent defendant, a trial judge 'for good cause' can order substitute counsel, but

absent a finding of 'good cause' the trial judge cannot order the DPA to pay the substitute counsel's fee."

Justice Keller is joined in his dissenting opinion by Justice Stumbo. (The decision itself is somewhat fractured. The Court breaks down differently on different parts of the opinion applying the principles to the facts in this case.) Justice Keller decried the majority for abandoning *Ivey*. "[W]e have never—until today, anyway—questioned the *Ivey* Court's conclusion that KRS 31.110 grants needy persons a statutory right to be appointed counsel in post-conviction proceedings. I believe we have done so largely because no other interpretation is even remotely defensible because the statute contains no ambiguity—KRS 31.110 unequivocally creates a right to appointed counsel in post-conviction matters." "The majority dismisses KRS 31.110's creation of a statutory right to appointed counsel in post-conviction proceedings on the basis of two (2) conclusions: (1) most of those pleadings are frivolous to begin with; and (2) the General Assembly has no authority to create such an entitlement."

For Justice Keller, whether most post-conviction motions are frivolous or not is not "germane" to the question of statutory interpretation. Further, "I believe the appointment of counsel is warranted if it only helps a handful of people. Even if the majority is correct that litigants infrequently obtain relief under RCr 11.42, I believe that fact merely demonstrates the need for the assistance of counsel in evaluation, preparation, and presentation of those claims…In my opinion, the appointment of counsel to assist laypersons, especially in light of the *Anders* type procedure contemplated in the last sentence of KRS 31.110(2)©, can only improve the quality of RCr 11.42 argumentation and reduce frivolous claims."

Justice Keller's primary disagreement is with the majority's separation of powers holding. "The legislative branch unquestionably has the authority to create a statutory right to appointed counsel. The United States Supreme Court says so and—until today, anyway—this Court has interpreted KRS Chapter 31 to create such a right and has, in the exercise of its constitutional authority, adopted procedures for the appointment of counsel in accordance with KRS Chapter 31."

Justice Keller quoted from *Pillersdorf* to point out that the majority has veered away from precedence. "The majority's contrary conclusion is *impossible to reconcile with* this Court's explicit declaration, in *Pillersdorf v. Dept. of Public Advocacy*, that the operation of the KRS Chapter 31 statutory framework does not implicate the judicial authority: '*This is not a separation of powers case because…no ultimate power of the judiciary (or any other branch of government) is in question…*'"

The dissent ended with a communication to trial judges on how to interpret *Fraser*. "In *Ivey*, this Court properly found that KRS 31.110 creates a statutory right to appointment of counsel for needy persons in post-conviction proceedings. Today's majority takes a giant leap *backwards* for no coherent reason. Because the prevailing view holds merely that trial courts are not *required* to appoint counsel unless the merits of the original RCr 11.42 petition require an evidentiary hearing, I would encourage the trial courts of this state to continue to make such appointments when requested for the purpose of supplementing RCr 11.42 petitions. I find it disconcerting that a majority of this Court does not recognize the importance of appointing counsel in post-conviction matters for needy persons who cannot afford to retain their own counsel. The General Assembly recognized the need for an equal playing field when it adopted KRS Chapter 31. Today's majority opinion derails the legislature's efforts and, unfortunately, restores the 'inequity between the needy and affluent' which, in *Ivey*, the Court found 'cured by the statute.'"

Together, the *Shelton* and *Fraser* opinions make for an odd and somewhat disconcerting message. Certainly, the right to counsel at the trial level is clear and vigorous. No separation of powers argument can be raised to diminish the right as already delineated in Chapter 31 and the criminal rules. The right to counsel at the post-conviction stage is less clear in Kentucky. The state has an interest in finality; that interest has been met by the 3-year statute of limitations now contained in RCr 11.42.

On the other hand, the need for a post-conviction remedy in Kentucky has never been clearer. One individual has been freed by DNA evidence after serving 8 years in prison for a rape he did not commit. Another individual has been acquitted and released from death row after his original conviction was reversed. A third individual has had DNA evidence come back showing he could not have been the perpetrator of a rape, evidence that appears now over a decade after he began to serve his time in prison.

The Kentucky Department of Public Advocacy has seen the necessity of establishing an *Innocence Project* in the Post-Conviction Branch. Nationally, 114 persons have been exonerated with DNA evidence. How many more inmates are serving time in prison for crimes they did not commit? How many innocent inmates do not have potential DNA evidence to exonerate them? How many innocent inmates are relying upon a post-conviction remedy to free them from the unjust shackles of their sentence? Is now really the time to diminish the post-conviction remedy in any way?■

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Study of Kentucky's Representation of Juveniles Released

The American Bar Association Juvenile Justice Center, the Children's Law Center has released "Advancing Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings," a year long study conducted to determine whether poor children in the Commonwealth have access to quality representation, and to examine the systemic barriers to effective advocacy. It is the second study of its kind in Kentucky, the first having been released by the Children's Law Center in 1996. The earlier report detailed a defender system riddled with financial difficulties, resulting in large numbers of youth being unrepresented, or represented by attorneys who lacked training in juvenile matters, or whose caseloads were too high to provide meaningful advocacy for their clients.

The new report highlights the efforts of Kentucky's three branches of government to address systemic reforms in juvenile justice, including the enhancement of defender services to children who are indigent. It reflects advancement toward the basic principles of justice, yet identifies areas where continued improvement is necessary to reduce systemic barriers to effective representation.

"Clearly, the report shows that the state has made steady advances toward ensuring that poor children have representation at critical stages, particularly when they are charged with more serious offenses," says Kim Brooks, the study's principal author. "The clear message, however, is that the work is not yet done to level the playing field, and that those advances made by the current administration must be sustained."

Upon reviewing the Report, Public Advocate Ernie Lewis said, "I hope that all defenders take pride on the immense progress that has been made in the quality of representation of Kentucky's children during the past 6 years. We must take to heart the Findings and Recommendations contained in this ABA Report and make the next 6 years just as productive in improving our system. Thanks to the ABA, Kim Brooks and her Center for their excellent study and report, and to all who participated in it. I have appointed DPA Trial Division Director David Mejia in whose Division over 17,000 juvenile clients are represented, Post-Trial Division Director Rebecca DiLoreto in whose Division clients are represented who are in a juvenile facility and Jeff Sherr, Manager of DPA's Education Branch that develops and produces DPA's regional juvenile Summits, the juvenile litigation track at our annual Persuasion Institute and at our Annual Conference to co-chair a Task Force on the implementation of the recommendations in "Advancing Justice: An Assessment of Access to Council and Quality of Representation in Delinquency Proceedings." They will gather a task force that hopefully will include Kim Brooks and other juvenile justice advocates to brainstorm ways to implement the ABA Report's recommendations, and to present your recommendations to the DPA Leadership Team for action. One of the DPA Task Force primary tasks will be to explore what DPA can accomplish both within our existing resources, particularly in collaboration with other individuals or groups, and what we can only accomplish with additional resources over the long-term."

Executive Summary

The juvenile justice system in Kentucky has endured a substantial history of problems concerning its treatment of juvenile offenders and the lack of systemic advocacy and focused reform efforts. After years of public criticism, media attention, litigation challenging the conditions in Kentucky's juvenile facilities, lack of access to the effective assistance of counsel and to the courts, and failure to provide adequate treatment, Kentucky officials began the long road to institutional change by the second half of the 1990's. The creation of the Department of Juvenile Justice, the commitment of Governor Patton to help fix a broken juvenile justice system, and the Kentucky legislature's move to invest millions of new dollars into these initiatives were the beginning.

In 1996, the Children's Law Center, Inc. released its report entitled "Beyond *In re Gaul*t: The Status of Juvenile Defense in Kentucky," launching a series of criticisms against the Department of Public Advocacy's (DPA) indigent defense system for juveniles. Among its findings were:

- Caseloads among full-time DPA attorneys handling juvenile cases far exceeded IJA/ABA caseload standards and somewhat or severely hampered the attorneys' ability to represent juveniles effectively.
- Caseloads among contract attorneys for DPA, most of whom were newer attorneys, were even higher, and resulted in even more severe limitations on their ability to effectively provide representation to youth.
- Significant numbers of youth were unrepresented at detention hearings and throughout various stages of juvenile court proceedings.
- Inadequate time was spent meeting with clients, and youth reported in significant numbers that they were rushed through the process and felt forced to enter plea agreements without understanding their options.
- Trial practice and preparation for disposition hearings in juvenile court were weak and showed an overall lack of advocacy efforts.
- Post-dispositional advocacy was nearly non-existent, including appellate practice, writs and other civil actions.
- Representation of youth appeared weakest in areas covered by contract counties, as evidenced by higher caseloads, confusion of the role of the attorney, and higher incidents of waiver of counsel.

The report made numerous recommendations to the Department of Public Advocacy, including measures to reduce caseloads in full-time offices and in contract counties, increasing defender resources, equity in DPA resources to ensure adequate representation for juvenile defendants, the adoption of

standards, and ensuring adequate support services and data collection capabilities.

A. Responding to the Findings

The Kentucky Department of Public Advocacy (DPA), in response to criticisms launched in the 1996 report, undertook its own extensive needs assessment regarding its indigent juvenile defense system in order to determine training needs, funding and other necessary resources, and to examine the need for other internal structural changes. Named "The *Gault* Initiative," this initiative included plans not only to increase educational programs for attorneys practicing juvenile law, but also to provide a mechanism for using technology for defenders through a ListServe, mentoring new attorneys, and improving materials and other resources for juvenile defenders. DPA requested and received additional resources to implement these reforms in the 1998 legislative session, including funds for six new trial attorneys in full-time field offices to focus on juvenile representation, two juvenile appellate lawyers, and two Masters level social workers.

In late 1998, the Department also created the "Kentucky Blue Ribbon Group on Improving Indigent Defense in the 21st Century," a 20-member group organized to pro-mote an agenda for public defender reform. Among the Blue Ribbon Group outcomes are the following:

- The 2000 General Assembly passed the Governor's budget with the stated increases for DPA, including $4 million in FY 2001 and $6 million in FY 2002 in order to open offices in 21 counties, reduce defender caseloads, expand appellate capacity, and increase salaries for DPA attorneys.
- 2001 starting salaries were raised to $35,000, increased from $23,388 for entry level attorneys, while experienced attorneys were raised 8% for 2000 and 9% for 2001. Attorney Manager salaries were increased from a starting point of $62,985, with the average being $78,684.
- Staff turnover rates were reduced from 14% in 1999 to 11.8% in 2001.
- Cost-per-capita increased 45%, from $4.90 in FY 1998 to $7.14 by FY 2002.
- Caseloads for individual full-time trial lawyers have been reduced by 11.5% since 1999, from an average of 475 to an average of 420.
- Caseloads for Louisville have been reduced from an average of 603 per full-time attorney to 405.

In May of 1996, the Juvenile Post-Disposition Branch was created to provide legal defense services to juvenile offenders incarcerated in residential treatment facilities operated at that time by the Cabinet for Families and Children. This program is part of the implementation of a consent decree on behalf of juveniles in state operated residential treatment programs. Attorneys provide access to the courts regarding the fact of, duration of, or conditions of confinement that may violate the federal statutory or constitutional rights of juveniles in these facilities.

A second significant structural change since 1996 within DPA has been the creation of several new trial offices, replacing the contract system in many parts of the state. In 1996, the Department of Public Advocacy covered 47 counties with a total of 17 field offices. By December of 2001, this number grew to 23 field offices covering 102 counties.

Three other full-time offices, located in Boyd, Fayette and Jefferson Counties, are operated by separate non-profit entities, bringing the total number of counties covered by full-time offices to 105. The remaining 15 counties continue to work through a con-tract arrangement with private attorneys.

B. Reassessing Indigent Juvenile Defense

In the summer of 2001, the Department once again sought to have an assessment of its indigent juvenile defense services in order to determine its progress and consider any additional steps necessary to enhance services.

Specifically, the study's objectives were to:

- Assess the ability of youth in Kentucky to have access to counsel in delinquency and status offender proceedings (trial and post-disposition);
- Assess the quality of indigent representation being provided to youth in Kentucky (trial and post-disposition);
- Evaluate the capacity of the juvenile defense bar to address cultural competencies in its representation of youth, including African-American and Hispanic youth;
- Determine significant substantive issues affecting the juvenile defense bar that impact upon resource allocation, funding and other barriers to effective representation (*i.e.* capital, transfer, status offenders, female offenders, etc.);
- Assess the progress made through strategic planning and implementation over the last five years in improving juvenile indigent defense; and,
- Highlight promising practices in Kentucky among the indigent juvenile defense bar.

The assessment, completed by the Central Juvenile Defender Center through the Children's Law Center, Inc., was done in partnership with the Juvenile Justice Center of the American Bar Association through its National Juvenile Defender Center, and included the assistance of numerous attorneys, law students and others. In addition to extensive surveying of judges and indigent defense counsel across the state, nearly 170 youth were interviewed in juvenile detention and treatment facilities about their experiences in the juvenile court system, and more specifically, their experiences with attorneys. Site visits were conducted in a number of juvenile courts where investigators observed the performance of attorneys in court, conducted interviews with parents, youth, judges, juvenile justice workers, social workers, attorneys and others, and explored the overall judicial climate and handling of juvenile cases among differing jurisdictions. Finally, since Kentucky's historical background regarding juvenile justice is important in considering its current status, numerous interviews were conducted with "key stakeholders," that is, individuals with long term involvement and perspective on juvenile justice issues throughout the state, and those who were instrumental in reform initiatives over the years.

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C. Significant Findings

While the report is comprehensive in its findings and recommendations concerning indigent defense and systemic barriers to effective representation, some of the most significant findings include the following:

- While average caseloads have been reduced for trial attorneys statewide, some counties report juvenile cases far in excess of the IJA/ABA Standards and the NLADA Standards.
- Interviews with youth in facilities indicate that, with few exceptions, most were represented by counsel for the charges leading to their incarceration. Interviews with youth and families in the community during site visits, however, revealed that waiver of counsel was more prevalent among those non-detained youth. In spite of legislation and case law to the contrary, it is clear that large numbers of youth are still waiving counsel without the appropriate procedural safeguards.
- Insufficient procedures are in place in many if not most parts of the state to pro-vide early access to counsel, including at meetings with Court Designated Workers or for police questioning. Most attorneys still appear to conduct their first client meeting while at the courthouse when the youth and parents are present for hearings, with inadequate time to meet with the client for the first time, as well as inadequate time to speak with parents.
- The most frequent disposition of cases in juvenile courts in Kentucky is by informal adjustment and/or plea agreements. Most defender offices indicated that they try less than a quarter of the cases in juvenile court.
- Motion practice appears to have improved significantly, particularly the use of motions for discovery, motions raising competency issues, motions *in limine* and motions to suppress. It seemed apparent that in many areas of the state this has become an expected and routine practice.
- It appears that limited dispositional advocacy is being done with juvenile clients, other than occasionally raising an objection to the contents of the DOJJ pre-dispositional report. Although some exceptions were found, disposition hearings tended to be "rubber-stamping" recommendations by DOJJ, with little advocacy effort on the part of the attorney with any supplemental evidence.
- Post-disposition advocacy for youth in treatment facilities and other residential settings, as done by the Juvenile Post-Disposition Branch, appears to be highly effective in addressing individual client's needs as well as systemic change. More post-disposition advocacy services should be available through trial offices, how-ever, particularly when youth are not incarcerated.
- There has been a significant rise in the number of appeals filed on behalf of juveniles, as well as other forms of extraordinary relief such as writs of *habeas corpu*s.

D. Barriers to Effective Representation

The assessment also identified a number of systemic barriers faced by defenders, local courts and others in assuring access to counsel and quality representation for youth in the juvenile justice system. Among these findings are the following:

- Although the overall results of data collected and observations made shows that DPA has taken some significant steps in improving the quality of representation, this is not consistent across the state. The advances in creating full-time offices appears to have significantly improved representation and the availability of counsel, while some of the poorest examples noted were in some areas still using contract attorneys.
- There are significant inconsistencies in the representation of status offenders, both as to appointment of counsel and quality of representation. In some areas, for example, public defenders are not appointed at all, but rather the courts utilize guardians *ad lite*m.
- Effective representation is adversely effected in some parts of the state due to crushing caseloads, court docketing, and geographic challenges in multi-county offices.
- While Kentucky's juvenile detention facilities are not generally overcrowded beyond capacity (and indeed are often under capacity), the assessment concluded that detention is over-utilized in some cases for youth who could be effectively served in less restrictive and more effective settings. This was particularly true for status offenders and youth being held in contempt of court.
- The erosion of confidentiality for youth in the juvenile justice system is a significant concern, both in juvenile court proceedings as well as the improper flow of information between courts, juvenile justice workers and schools. It appears that schools have a direct line to judges in some areas without any concern for the due process rights of students and other procedural safeguards afforded through the Kentucky Juvenile Code.
- Defenders are challenged by a system where youth with significant mental health and disability needs are prevalent, yet comprehensive community based mental health, substance abuse and other treatment options are often scarce and "cookie cutter" in their approach.
- Minority youth are over-represented in nearly every aspect of Kentucky's juvenile justice system, from arrest to transfer to incarceration. Defenders in some parts of the state face particular challenges in securing this data, identifying possible disparities, and advocating for policies and practices that may reduce these disparities.
- Likewise, the growing number of Hispanic youth and families in Kentucky present challenges to the defender community that must be effectively addressed through programs of cultural awareness, diversity in defender staff, and access to translators and Spanish-speaking personnel.
- The availability of the death penalty for youth who commit certain offenses in Kentucky continues to have a crushing effect on resources for those attorneys handling such cases, and such penalty continues to exist in spite of legislative attempts to abolish the practice.
- The emergence of "zero tolerance" policies and the criminalization of school-based conduct are widespread in

Kentucky courts in spite of the continued decline in problematic school behavior. This is particularly troublesome in that minority children and youth with disabilities tend to suffer the most severe consequences in school disciplinary actions.
- The number of females in the juvenile justice system has increased markedly.

This population presents certain unique problems. Advocates are unsure as to whether such growth is due in part to an increase in violent behaviors, or whether it is due to the relabeling of girls' family conflicts as violent offenses, changes in police practices regarding domestic violence and aggressive behavior, gender bias in the processing of misdemeanor cases, or perhaps a fundamental systemic failure to understand the unique developmental issues facing female offenders.

E. Recommendations

Over the last five years, the Commonwealth of Kentucky has made some significant changes in its indigent defense structure including funding and overall performance over the last five years as it pertains to access and quality of indigent juvenile defense. This assessment makes a number of recommendations, however, to ensure continued improvement, to sustain existing reforms, and to assure that youth in the juvenile justice system are guaranteed their constitutional right to effective assistance of counsel.

The Kentucky Department of Public Advocacy and its Local Defender Offices should ensure that:
- Sufficient resources are consistently made available in local trial offices to provide effective assistance of counsel including appropriate training and the availability of support staff with special expertise to assist in representation;
- Caseloads are reduced in all areas of the Commonwealth where they currently exceed the IJA/ABA Standards, with special consideration given to areas with offices covering multiple counties and urban counties with a high number of felony and/or juvenile transfer cases;
- Consistency in the quality of representation is achieved and maintained;
- Equity in the allocation of resources to juvenile defense is achieved and maintained as compared to adult defense resources;
- Availability of counsel at early stages is consistently provided, including provisions for police questioning and preliminary inquiries with Court Designated Workers. Availability of counsel is provided to 18-year-old youthful offenders returning to sentencing court for release consideration;
- The continued use of contract attorneys to cover juvenile dockets is closely monitored to ensure that the attorneys are providing effective assistance of counsel and receiving adequate training and oversight;
- Its program of strong post-dispositional representation is sustained, and the agency continues to utilize the expertise of the Juvenile Post-Disposition Branch as a resource to trial offices and in effecting state policies concerning juvenile justice;
- Status offenders are provided with access to counsel in all parts of the state and that such counsel, not a guardian *ad litem*, is provided to represent their express wishes;
- Strong disposition advocacy for status, public and youthful offenders becomes a priority within field offices and that adequate resources are available to attorneys to assist in preparation for these hearings;
- Adequate resources are available within trial offices to effectively address cultural and language barriers with Hispanic clients, including availability of Spanish-speaking staff and/or interpreters, and training on legal and cultural issues which may affect representation;
- Defenders play a critical role in shaping local policies and practices with the creation of specialty courts, as well as with school based or mental health initiatives;
- Continued work is done on creating accurate data on caseloads, outcomes and other juvenile justice information essential to planning and evaluating indigent juvenile defense services; and,
- Participation in juvenile and criminal justice initiatives, policy work, and legislative advocacy is achieved without compromise to the Department's essential independent advocacy role for poor children.

State and local agencies, including defenders, should work collaboratively to address issues in the juvenile justice system facing Kentucky's youth, including:
- Further examination of disproportionality of minority youth in the juvenile justice system as it relates to arrest, detention, transfer and incarceration, particularly in urban areas of the state, and the development of appropriate strategies and services to reduce disparities;
- Further examination of gender based issues involving female offenders, with appropriate development of strategies and services to this population;
- Development of data regarding school based complaints to juvenile courts to critically examine the need for alternatives to criminalization of youth with emotional, behavioral, and/or other mental health needs;
- Improvement in the availability and quality of services to status offenders, including youth who are truant and/or beyond control to reduce the likelihood of further involvement in the juvenile justice system;
- Improvement in the quality and availability of re-entry programs for youth completing incarceration and in need of services back in their local communities; and,
- Critical analysis of mental health and substance abuse programs for youth in the juvenile justice system to ensure intervention and treatment options proven to be effective are readily available.

This assessment contains numerous other recommendations for Kentucky Courts of Justice, law schools, media, and state and local bar associations. ■

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